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SPECIAL FEATURE: WINNER, BEST APPELLATE BRIEF IN THE 1998-99 NATIVE AMERICAN LAW STUDENT ASSOCIATION MOOT COURT COMPETITION

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SUMMARY: ... I. Whether the Muscogee (Creek) Nation government, reorganized under the Oklahoma Indian Welfare Act (OIWA) maintains jurisdiction to promulgate regulations over lands within Nation territory when the territory has not been disestablished or diminished, and the health and welfare of the tribe is at stake. ... The Muscogee (Creek) Nation, Reorganized Under the Oklahoma Indian Welfare Act Which Repealed the Curtis Act and Five Tribes Act, Maintains Jurisdiction to Promulgate Regulations Over Lands Within Nation Territory Because the Territory Has Not Been Disestablished Nor Diminished, And the Health and Welfare of the Tribe is at Stake. ... In Montana, however, this Court affirmed inherent tribal power to regulate even non-members on non-Indian land within reservation borders when, as here, non-member conduct threatens the political integrity, economic security, or the health and welfare of the tribe. ... Until recently, Oklahoma had been thought of as lacking Indian land with "reservation" status because Oklahoma tribes held land in fee simple title. ... This Court has held that the creation of an Indian reservation by the Federal government implies an allotment of water necessary to make the reservation livable. ...

TEXT:

[*197] Questions Presented

I. Whether the Muscogee (Creek) Nation government, reorganized under the Oklahoma Indian Welfare Act (OIWA) maintains jurisdiction to promulgate regulations over lands within Nation territory when the territory has not been disestablished or diminished, and the health and welfare of the tribe is at stake.

II. Whether the Muscogee (Creek) Nation maintains jurisdiction over waters within the Nation territory which includes the Arkansas River under either the doctrine of collateral estoppel or the Winter's doctrine.

III. Whether the Muscogee (Creek) Nation meets the Environmental Protection Agency (EPA) criteria to qualify for Treatment As a State (TAS) status and therefore the EPA approval of the Nation's application is valid.

Jurisdiction

Jurisdiction is conferred by *28 U.S.C. § 1254* (1).

Statement of the Case

I. Proceedings and Disposition of the Court Below

The opinion of the United States Court of Appeals, Tenth Circuit, is unreported. That opinion reversed the United States District Court grant of summary judgment to Appellant Tulsa, and upheld the EPA approval of the Treatment As a State (TAS) application to the Muscogee (Creek) Nation in June 1998.

The Order of the United States District Court for Oklahoma, dated October 1997, is also unreported. That Order granted summary judgment to Tulsa.

II. Statement of Facts

The facts of this case are in dispute. The Muscogee (Creek) Nation (hereinafter Muscogee Nation or the Nation), formerly identified as the Creeks by non-Indian settlers, is one of the "Five Civilized Tribes," a federally **[*198]** recognized Indian nation with its territory and population centered in eastern Oklahoma. In January 1996, the Muscogee Nation reestablished the traditional green corn harvest religious ceremonial to give thanks for the resurgence of Muscogee government and its economic successes. (Jt. App. 3) The Nation chose a site on 100 acres of original Nation fee land in Tulsa, in recognition of the role that towns like Tallasi Town (Muscogee language for Tulsa) had in the great Creek Confederacy. (Jt. App. 3) The ceremony, of deep religious and economic significance to the Muscogee Nation, utilizes waters of the Arkansas River. (Jt. App. 3)

The Muscogee Nation was concerned about water pollution from the city of Tulsa wastewater treatment plant operated by the city of Tulsa twelve miles upstream from the ceremonial site on the Arkansas River. (Jt. App. 3) The plant operates under an Environmental Protection Agency (EPA) administered National Pollution Discharge Elimination System (NPDES) permit. (Jt. App.3) The Muscogee Nation sought recognition from the EPA for Treatment As a State (TAS) as encouraged by the 1987 amendments to the Clean Water Act (CWA). See *33 U.S.C. § 1377*(e). (Jt. App. 3) The EPA granted the Nation TAS status in August 1996. (Jt. App. 3) The Muscogee Nation then legislated water quality standards (WQS) for the section of the Arkansas River in dispute in this case and all other water within Muscogee Nation borders. (Jt. App.3)

Tulsa filed the present action in January 1997 in response to the EPA's planned revision of Tulsa's NPDES permit to comply with the Muscogee Nation's WQS. (Jt. App. 3) Tulsa challenges Muscogee Nation TAS status based on allegations of insufficient tribal jurisdiction, and inappropriate EPA administrative action. (Jt. App. 4)

III. Standard of Review

The issues presented in this appeal are issues of law and are reviewed de novo. *United States v. McConney, 728 F.2d 1195 (9th Cir. 1984)* (en banc).

Summary of Argument

The Muscogee Nation and the EPA request affirmation of the Tenth Circuit Court of Appeals decision validating and enforcing EPA's approval of the Muscogee Nation's application for TAS status.

The Muscogee Nation has maintained jurisdiction over lands within its territory, including the bed of the Arkansas River and the Mackey Site. The Nation's jurisdiction over lands within its original borders has not been disestablished nor diminished by the Curtis Act or the Five Tribes Act. Moreover, the limitation established on Muscogee Nation governmental functions by those two Acts, the presidential approval power over all proposed tribal legislation, was repealed by the OIWA.

[*199] The Muscogee Nation has also maintained jurisdiction over waters within Nation territory which include a portion of the Arkansas River. As a threshold matter, the city of Tulsa should be precluded from litigating this issue again because the doctrine of collateral estoppel applies to Oklahoma's rights as to all sections of the Arkansas River running over territory granted to the Five Civilized Tribes. In the alternative, the Winter's Doctrine reserves to the Muscogee Nation a quality of territory water to fulfill the purposes of the reservation and guarantee habitability for the Nation's people.

The Muscogee Nation meets all of the Environmental Protection Agency (EPA) criteria to qualify for Treatment As a State (TAS): (1) It has a governing body carrying out substantial governmental duties; (2) It seeks to apply water quality standards which pertain to protection of water resources held by the Nation or otherwise within the borders of an Indian reservation; and (3) In the EPA Administrator's judgment, the Nation can carry out its technical functions in a manner consistent with the terms and purposes of CWA. See *33 U.S.C. § 1377*(e) (1988).

Argument

a. Historical Background

As in so many cases involving Native American rights, the facts of this case hinge on specific historical events that are subject to more than one interpretation. Aboriginal Muscogee Nation land was located in what is now the state of Georgia. Due to non-Indian influx into that region and demand for land, the Muscogee Nation was removed by the U.S. Government to Indian Territory which today is part of the state of Oklahoma. See Removal Treaty, Mar. 24, 1832, art. IV, 7 Stat. 366 (provision for land patents to the Creek Nation from the United States).

In exchange for cession of lands east of the Mississippi River, the United States conveyed this new land in Indian Territory with title in fee simple to the Muscogee Nation. Id. at art IV. The Treaty of 1832 also guaranteed to the Muscogee Nation the perpetual right of self-government. Id. at art. XIV.

The Muscogee Nation later fought for the confederacy during the Civil War, and in punishment the United States took the western half of Indian Territory, designating it as "Oklahoma Territory." See Oklahoma Territory Organic Act, May 2, 1890, § 1-28, 26 Stat. 81. The eastern half of Indian Territory, however, remained in fee simple title as property of the Indian Nations, with specific land forever set apart in fee simple as a home for the Muscogee Nation. See Treaty with the Creek Indians, June 14, 1866, art. III, 14 Stat. 785, 786-87 (forever setting aside Creek lands). The original boundaries of the Muscogee Nation bordered on the west by a north-south running line running through present day Seminole, Oklahoma. (Jt. App. 1) The southern border was marked by the Canadian River, the northern border was an east-west line running just above present day Tulsa, Oklahoma, and **[*200]** the eastern border ran northeast from Eufala, Oklahoma, to Fort Gibson, and then continued directly north to Chouteau, Oklahoma. (Jt. App. 1)

In 1867, Congress passed the General Allotment Act (codified as amended at *25 U.S.C. § 331* et. seq. (1983)). Its purpose was to assimilate tribes consistent with the future goal of terminating tribal reservation land bases. FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 128 (1982) (emphasis added). Muscogee Nation land, like that of the other Five Civilized Tribes, was excluded from the Allotment Act because those Indian Nations held their lands in fee simple. See *25 U.S.C. § 339.* Congress believed that because the Five Tribes held their land in fee, rather than by aboriginal title of occupation held in trust by the federal government, those Indian Nations could not be divested of their territories without their consent. However, the land fever and anti-tribal sentiment was strong during this period in American history, so in 1893 Congress created the Dawes Commission to negotiate allotment agreements with, among others, the Muscogee Nation. See Act of Mar. 3, 1893, ch. 209, 27 Stat. 612.

The Muscogee Nation resisted all efforts to open any part of their territory to non-Indian settlement. Congress responded by adding several coercive provisions to the Indian Department Appropriations Act, June 7, 1897, ch. 3, 30 Stat. 62. One of these provisions provided for presidential approval power over all laws passed by any of the councils of the Five Tribes. Id. at 62. The Muscogee Nation continued to insist on its legal rights conferred by treaty and fee title ownership of its territories. Consequently, Congress passed the Curtis Act, which provided for strong-arm forced allotment of tribal lands without tribal consent unless the tribe "agreed" to allotment. See Act of June 28, 1898, § 28, 30 Stat. 495, 504-05. The Curtis Act was enacted with the understanding that Muscogee title did not allow for unilateral divestment, and minimally required the "consent" of the Muscogee Nation to allow for any allotment. Id.

The Curtis Act resulted in an agreement with the Muscogee Nation that provided for the termination of the entire Muscogee government by Act of Mar. 1, 1901, ch. 676, 31 Stat. 861. However, continued Muscogee Nation resistance and administrative difficulties resulted in the passage of the Five Tribes Act of April 1906, ch. 1876, 34 Stat. 137, in which Congress expressly perpetuated the existence and government of each of the Five Tribes. Subsequent courts have held that throughout this upheaval the Muscogee government persisted. See *Muscogee (Creek) Nation v. Hodel, 851 F.2d 1439 (D.C. Cir. 1988).* Neither the Curtis Act nor the Five Tribes Act ever mentioned water rights, nor did they contain express language that abrogated or diminished the original boundaries of Muscogee tribal territory.

In 1936, Congress passed the Oklahoma Indian Welfare Act (OIWA). See Act of June 26, 1936, 49 Stat. 1967 (codified at *25 U.S.C. §§ 501* et. seq. (1983)). The OIWA, like the Indian Reorganization Act (IRA) passed two years before (Act of June 18, 1934, 48 Stat. 984, as amended (Indian **[*201]** Reorganization Act), *25 U.S.C. §§ 461* et seq.) provided for constitutional governments and corporate charters for Indian tribes in Oklahoma. The self-government

provision of the OIWA is different from the IRA, however, and does not contain the same limiting language. See Oklahoma Indian Welfare Act, § 3, *25 U.S.C. § 503.* See also Indian Reorganization Act §§ 461 et. seq., *25 U.S.C. 476.*

In 1979, under the authority of the OIWA, the Muscogee Nation adopted a new constitution. This constitution expressly secured the boundaries of the Nation's territory as they appeared in 1900 based upon the treaties between the U.S. government and the Muscogee Nation. The Muscogee Nation government established under the 1979 constitution applied to the EPA for Treatment As a State (TAS) status under the Clean Water Act (CWA). Following EPA approval, the Muscogee Nation passed the water quality standards at issue in this case.

The CWA prohibits discharges from a point source of any pollutant into waters unless the discharge complies with the Act's requirements. See *33 U.S.C. § 1311*(a). The National Pollution Discharge Elimination System (NPDES) permit requires emission compliance from dischargers. See *33 U.S.C. § 1342.* NPDES permits are issued by EPA or, in those jurisdictions in which EPA has authorized a state agency to administer the NPDES program, such as Oklahoma since 1996, by a state agency subject to EPA review. See *33 U.S.C. § 1342*(b). Where a state is granted authority to administer the NPDES program, the EPA continues to administer NPDES permits for federal territories not within state jurisdiction. See *56 Fed. Reg. 64876.*

Under the NPDES program, each state must adopt water quality standards for its waters. See *33 U.S.C. § 1313.* These standards are subject to review and approval by EPA. See *33 U.S.C. § 1313*(a). Once water quality standards have been adopted, either the EPA or a state will issue NPDES permits only to dischargers who are in compliance with the state's standards. See U.S.C. § 1341(a). Regardless of whether the EPA or a state is granting NPDES permits, all upstream permits must comply with legitimate downstream water quality standards. See generally, *Arkansas v. Oklahoma et al., 503 U.S. 91 (1992).*

In 1987, Congress added 1377(e) to the CWA that authorizes EPA to permit tribes to be "treated as a state" (TAS) for the purposes of establishing water quality standards. See *33 U.S.C. § 1377*(e). EPA issued a final rule in 1991 implementing this provision by setting forth the standards for processing tribal requests for TAS status and the attached authority to establish these standards. See *56 Fed. Reg. 64,876 (1991)* (codified at *40 C.F.R. § 131.8(b)(3)*). It is EPA approval of Muscogee Nation TAS status under these regulations that are at issue in the present case.

[*202] b. Analysis

1. The Muscogee (Creek) Nation, Reorganized Under the Oklahoma Indian Welfare Act Which Repealed the Curtis Act and Five Tribes Act, Maintains Jurisdiction to Promulgate Regulations Over Lands Within Nation Territory Because the Territory Has Not Been Disestablished Nor Diminished, And the Health and Welfare of the Tribe is at Stake.

A. Muscogee Nation Territory Has Not Been Disestablished.

The Muscogee Nation jurisdiction over lands within its original national borders has not been disestablished. To determine whether tribal rights to territory and land have been disestablished, this court should apply the test set out in *United States v. Dion, 476 U.S. 734 (1986).* Disestablishment of tribal treaty rights is an abrogation of those rights. Abrogation of treaty rights should never be lightly imputed; however, where Congress has explicitly used its authority to abrogate a Native American treaty right, Congressional will controls. See *Rosebud Sioux Tribe v. Kneip, 430 U.S. 584, 586 (1977).*

There is no explicit language in either the Curtis Act or the Five Tribes Act disestablishing the Muscogee Nation's original territorial boundaries. Because of the lack of specific language in these Acts, the presumption is strong that there was no Congressional intention to abrogate territory granted in the Treaty of 1866. See Treaty with the Creek Indians, June 14, 1866, art. III, 14 Stat. 785, 786-87 (guaranteeing Muscogee territory in fee with the promise that no part of the land should ever be embraced in any territory or state).

In Dion, the Court considered whether a Native American who takes an eagle on tribal land violates the Eagle Protection Act, *16 U.S.C. § 668*(a) (1962). See *Dion, 476 U.S. at 737.* Dion stated that the preference for an explicit statement by Congress was not a per se rule. *Id. at 739.* However, the Court in that case established that there must be

"clear evidence that Congress actually considered the conflict between its intended action on the one hand and Indian treaty rights on the other and chose to resolve that conflict by abrogating the treaty." *Id. at 740.*

The Dion test established a high standard of proof for abrogation. *Id. at 741.* Dion is consistent with the long settled tenet that Indian treaty rights are too fundamental to be easily cast aside, and "absent explicit statutory language, [the courts] have been extremely reluctant to find Congressional abrogation of treaty rights. . . ." *Washington v. Washington Commercial Passenger Fishing Vessel Assn., 443 U.S. 658, 690 (1979).*

The Curtis Act and the Five Tribes Act admittedly were enacted with the future elimination of Muscogee Nation territory and eventual Muscogee Nation assimilation in mind. But as this Court has said,

[*203] acts that sought to achieve the same ends in a specific situation as allotment did in general, . . . which was to continue the reservation system and the trust status of Indian lands, but to allot tracts to individual Indians and to promote interaction between the races and encouraging the Indians to adopt white ways, . . . do not, alone, recite or even suggest that Congress intended thereby to terminate [those specific reservations or trust status lands]. *Mattz v. Arnett, 412 U.S. 481, 490 (1973).*

Under even the broadest application of the Dion test, however, neither the Curtis Act nor the Five Tribes Act abrogated the Muscogee Nation's external territorial boundaries conferred under the Treaty with the Creek Indians. See Treaty of June 14, 1866, 14 Stat. at 785. Neither the Curtis Act nor the Five Tribes Act contains language that expressly abrogates the territorial boundaries of the Five Civilized Tribes. See Act of Mar. 3, 1893, ch. 209, 27 Stat. 612. See also Act of Mar. 4, 1906 (Act of Mar. 1, 1901, ch. 676, 31 Stat. 861). In addition, neither the legislative history nor surrounding circumstances of these two Acts show the required Congressional consideration of Muscogee Nation treaty rights plus the intention by Congress to abrogate those rights. Id. Consequently, when the Dion test is applied to the facts in this case, this Court must reject Tulsa's claim that the Muscogee Nation had been disestablished with regard to its territorial boundaries.

B. Muscogee Nation Territory Has Not Been Diminished.

The Muscogee Nation's external boundaries have not been diminished in geographic scope. Although the Curtis Act, June 28, 1898, § 28, 30 Stat. 495, 504-05 [hereinafter Curtis Act], subjected the Muscogee Nation's land base to coerced allotment, the Muscogee national land base was not diminished. This Court has never been willing to "extrapolate from early twentieth century colonial ideas about the purported demise of Indian reservations any specific congressional purpose to diminish reservations with the passage of every surplus land act." See *Solem v. Bartlett, 465 U.S. 463, 468-69 (1984).* This ruling also applies to Indian lands held in fee, or in arrangements not typically referred to as "reservations." See generally *Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe of Okla., 498 U.S. 505, 511 (1991)* (holding that trust lands validly set apart for the use of Indians qualified as "reservations" for the purposes of defining Indian Country). The first principle of the Solem test dictates that once land is set aside as "Indian Country" it remains so unless Congress explicitly indicates otherwise, regardless of the title status of individual plots within its boundaries. See *U.S. v. Celestine, 215 U.S. 278, 285 (1909).* Nor will diminishment be lightly inferred. See *Rosebud Sioux Tribe v. Kneip, 430 U.S. 584, 615 (1977).* In this case, the standard for finding diminishment is even higher because the Five Civilized Tribes held their land in fee, and thus possessed land rights superior to other Indian tribes. See *Montana v. United States, 450 U.S. 544 (1981).* **[*204]** Indeed, this Court has specifically acknowledged that the Five Civilized Tribes held their title under special historical circumstances that gave them superior title to other "reservation" Indians. *Id. at 555* (emphasis added).

A small group of surplus land acts have been found to diminish reservations. See *Rosebud Sioux Tribe, 430 U.S. at 615* (holding that the Rosebud Sioux Reservation was diminished because surrounding circumstances of congressional activity unequivocally demonstrated that Congress evinced intent to change boundaries). See also *DeCoteau v. District County Court, 420 U.S. 425, 444-45 (1975)* (explaining that the reservation was diminished due to express reference to cession and total surrender of all tribal interests).

Most surplus acts, however, did not diminish reservations. See generally *Mattz v. Arnett, 412 U.S. 481, 505 (1973)* (holding the reservation not diminished when both act and legislative history fail to provide substantial and compelling evidence of congressional intent to diminish). See also *Seymour v. Superintendent, 368 U.S. 351, 358 (1962)* ("Indian

country" not diminished because statutory language, "notwithstanding the issuance of any patent," applies with equal force to fee patents issued to non-Indians and Indians alike).

In Rosebud and DeCoteau, this Court found language of diminishment in legislative action towards specific tribes that contained clear expression of congressional intent to diminish. See *Rosebud Sioux Tribe, 430 U.S. at 615.* See also *DeCoteau v. District County Court, 420 U.S. at 425.* In both cases, the tribes involved were located on reservation land held in trust for the tribe by the U.S. government, and possessed only aboriginal title. See *Rosebud Sioux Tribe, 430 U.S. at 586.* See also *DeCoteau, 420 U.S. at 427.* Conversely, in Mattz and Seymour, despite the extensive allotment of land to non-Indians within original tribal territory, this Court did not find any clear expression of congressional intent to diminish reservation boundaries. See *Mattz v. Arnett, 412 U.S. at 481.* See also *Seymour v. Superintendent, 368 U.S. at 351.*

To determine whether Muscogee Nation territory was diminished, it is necessary to examine two factors. First, this Court must look at the history of congressional dealings with the Nation through Congressional enactments and the surrounding circumstances of that legislation. Second, this Court must consider the facts in the instant case in light of the analyses provided in the above-cited case law to determine whether under Solem this court should find Muscogee Nation territorial diminishment.

In 1887, Congress passed the General Allotment Act (codified as amended at *25 U.S.C. §§ 331* et seq. (1983)), which provided that lands held in trust for Indians by the United States would be divided up and parcels given to individual Indians in fee simple. The General Allotment Act, § 8, specifically excluded the Five Civilized Tribes, including the Muscogee Nation, from application of the Act because their lands were held in fee simple title. Id. **[*205]** The superior quality of the title held by these Nations meant that these Tribes would have to consent to allotment to be divested of their property right. See *Woodward v. De Graffenried, 238 U.S. 284, 294 (1915).* Thus, the Allotment Act was passed with the understanding that Congress did not have the authority to unilaterally diminish the exterior boundaries of the Muscogee Nation held in fee simple.

Congress then empowered the Dawes Commission to negotiate consensual allotment agreements with the Five Civilized Tribes. See Act of Mar. 3, 1893, ch. 209, 27 Stat. 612, 645. Because the Tribes refused to negotiate with the Dawes Commission to allot their lands, several coercive provisions were later added into the Appropriations Act of June 7, 1897. 30 Stat. 62. One of these provisions was the requirement for presidential approval power over all legislation of the Five Civilized Tribes. Id. at ch. 3. With this provision, the Tribes' governments were essentially held hostage to the allotment process. They could not receive much needed monies to assist their people unless their governments surrendered to a presidential approval provision.

Although the Seminole Nation reached an agreement with the Dawes Commission, the Muscogee Nation continued to resist agreement to allot its lands. See *Muscogee (Creek) Nation v. Hodel, 851 F.2d 1439, 1441 (D.C. Cir. 1988).* Although a tentative agreement was reached between the Nation and the Dawes Commission, the Nation did not consent to abolish any of its title to its lands, and never consented to a diminishment of Muscogee Nation borders. See Creek Agreement, Mar. 1, 1901, 31 Stat. 861.

Congress then passed the Curtis Act to force allotment and eventual termination of the Five Civilized Tribes. This Act incorporated the tentative Muscogee Nation agreement providing that this agreement would supersede any inconsistent provisions of the Curtis Act if ratified by October 1, 1898. The Muscogee Nation never voted to ratify the tentative agreement incorporated in the Curtis Act, but Congress proceeded to allot sections of land to non-Indians within Muscogee Nation territorial boundaries.

The facts in this case can be distinguished from the facts in Rosebud v. Kneip, and DeCoteau v. District County Court, and are more closely analogous to the facts in Mattz v. Arnett, and Seymour v. Superintendent. As recounted above, neither the Curtis Act nor the Five Tribes Act contains the type of explicit language of diminishment found in Rosebud or DeCoteau, nor any other expression of congressional intent to immediately diminish the territorial boundaries of the Muscogee Nation. In addition, the legislative history fails to provide substantial and compelling evidence of congressional intent to diminish the external boundaries of the Muscogee Nation. In fact, Congressional understanding at the time was that Congress did not posses the power to affect such a diminishment, because of the superior fee title held by the Muscogee Nation in their territory. See *Woodward v. De Graffenried, 238 U.S. at 294.*

[*206] This Court should hold that the Muscogee Nation Indian Country has not been diminished. The Nation continues to have regulatory jurisdiction over lands within its original external boundaries. There has been no express congressional intent to diminish the Nation's external boundaries. Further, because the Muscogee Nation possesses its territory in fee simple, lack of express consent by the Muscogee Nation to any purported diminishment, at a time when Congress believed such consent was required, compels this Court to find that the Nation's territorial boundaries have not been diminished.

C. The Muscogee Nation Retains Inherent Power to Regulate Both Indians and Non-Indians for the Health and Welfare of the Tribe.

In general, absent express authorization by federal statute or treaty, Indian tribes lack civil authority over the conduct of non-members on non-Indian land within the external borders of a reservation. See *Montana, 450 U.S. at 564.* See also *Strate v. A-1 Contractors, 520 U.S. 438, 444 (1997)* (reaffirming). In Montana, however, this Court affirmed inherent tribal power to regulate even non-members on non-Indian land within reservation borders when, as here, non-member conduct threatens the political integrity, economic security, or the health and welfare of the tribe. See Montana, U.S. 450 at 556. In the instant case, Tulsa's conduct threatens the political integrity, economic security, and health and welfare of the Muscogee Nation.

This Court has applied the Montana principle regarding threatening conduct by non-members in several cases. In *Brendale v. Confederated Tribes & Bands of Yakima Indian Nation, 492 U.S. 408 (1989),* a fractured court struggled to apply the Montana principle to a zoning scheme. Although the actual holding in Brendale was determined by a two vote swing decision which was too specific to the reservation in that case to be usable as precedent, <=55> n1 there was a seven justice majority which agreed that a unitary solution for regulation of reservation land was legally desirable, and the disagreement was over the level to which the threatening conduct must rise before that unitary jurisdiction belongs to the tribe. See *Brendale, 492 U.S. at 430.*

A more recent case which applied the Montana principle was *A-1 Contractors v. Strate, 520 U.S. at 445.* In Strate, this Court found that a tribe had given up adjudicatory jurisdiction over a small stretch of highway which it had given as a federal right-of-way and which the state maintained. *Id. at 456.* Strate is distinct from this case in two ways. First, the tribe in Strate was seeking to assert adjudicatory jurisdiction over non-members and non-Indians. *Id. at 456.* Second, adjudicatory jurisdiction would have to arise from an event arising on the federal right of way and otherwise not affecting the **[*207]** health and welfare of the tribe. *Id. at 457.* In contrast, the Muscogee Nation in this case is seeking to assert regulatory jurisdiction within Nation territory, over conduct that is inherently threatening to the health and welfare of the tribe. Courts have previously recognized that threats to water rights may invoke inherent tribal authority over non-Indians. "A tribe retains the inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the health and welfare of the tribe. This includes conduct that involves the tribes' water rights." See *Colville Confederated Tribes v. Walton, 647 F.2d 42, 52 (1981).* See also *City of Albuquerque v. Browner, 97 F.3d 415, 423 (10th Cir. 1996)* (tribal promulgation of stringent water quality standards is permissible in accord with powers of inherent sovereignty). See also *Montana v. Environmental Protection Agency, 137 F.3d 1135, 1141 (10th Cir. 1998)* (tribal promulgation of water quality standards for heavily allotted reservation consistent with inherent sovereignty).

The fact that some landowners within Muscogee Nation boundaries cannot become members of the tribe, nor participate in tribal government is not pertinent to the disposition of this case. As has been repeatedly recognized by Congress and upheld by this Court, a superior right exists when Indian tribes act to protect tribal territory and people from substantial threats to tribal health and welfare (even when their actions affect non-Indians on non-Indian owned fee lands within tribal territory). See *Montana v. United States, 450 U.S. at 556.* See also *United States v. Mazurie, 419 U.S. 544, 557 (1975),* and *Brendale, 492 U.S. at 432.*

Further, this case does not involve a situation, such as was the case in both Montana and Brendale, where the individual property rights of non-Indian owners of fee land are effected. See *Montana, 450 U.S. at 544.* See also *Brendale, 492 U.S. at 408.* In this case, the subject of regulation is water quality, something that cannot be isolated by individual land ownership, and which directly and substantially effects the health and welfare of all of the Muscogee Nation members. In addition, the administrative nature of establishing and enforcing water quality standards involves extensive procedural protections for non-Indian land holders within Muscogee Nation territory, which Courts have held

to be more than enough to protect their interests. See *Albuquerque v. Browner, 97 F.3d 415* (where full and fair opportunity for notice and comment was provided).

D. The Muscogee Nation Legislature is Not Subject to the Presidential Approval Power from the Curtis Act or Five Tribes Act Because the Oklahoma Indian Welfare Act Repealed that Requirement.

The language in the Indian Department Appropriations Act, Curtis Act and Five Tribes Act which requires all Muscogee Nation legislation to be submitted for presidential approval has been repealed by the Oklahoma Indian Welfare Act. (OIWA) The language in the OIWA's self-government section **[*208]** taken together with the general repealer clause have already been found to have reinstated the Muscogee Nation's authority to establish tribal courts. See *Muscogee (Creek) Nation v. Hodel, 670 F. Supp. 434, 446 (D.D.C. 1987).* In that case, even though the Curtis Act was found to have abolished Muscogee Nation courts, the strong language of the self-government clause in combination with the general repealer clause was found to have restored the Muscogee Nation's power under the earlier 1866 Treaty to operate tribal courts. That case's reasoning is even more compelling here because the Muscogee Nation never lost the authority under its treaties with the U.S. government to pass legislation. Moreover, the requirement for presidential approval existed solely as a coercive weapon to compel allotment, and is in direct conflict with the expressly stated purposes of OIWA.

The tripartite government of the Muscogee Nation created by the CREEK CONSTITUTION of 1867 has survived the attempted United States congressional statutory dismemberment of the late nineteenth and early twentieth centuries, and has been expressly perpetuated by the United States government. See *Harjo v. Kleppe, 420 F. Supp. 1110, 1118 (D.D.C. 1976),* aff'd. sub nom. *Harjo v. Andrus, 581 F.2d 949 (D.C. Cir. 1978).* Following the judicial decision in Harjo v. Kleppe, the Muscogee Nation held an election in which the People adopted the MUSCOGEE (CREEK) CONSTITUTION of 1979. See *Muscogee Nation v. Hodel, 670 F. Supp. at 435.* This constitution was approved by the Secretary of the Interior on August 17, 1979. Id. It continues to be the instrument by which the Nation maintains its governing authority and under which the Nation carries out its substantial governmental duties.

The Constitution of the Muscogee Nation divides its tribal government into three branches: Executive, Legislative, and Judicial. Except as provided in the Constitution, these three departments are separate and distinct and do not exercise the powers properly belonging to the others. See Burden v. Cox, 1 Okla. Trib. 247, 251 (Muscogee (Cr.) Nation D. Ct. 1988). Duties of the Executive Branch of the Muscogee Nation include approval or veto of Muscogee National Council legislation. See MUSCOGEE (CREEK) CONSTITUTION, art. VI, § 6, sub § A. Legislative duties of the Muscogee National Council include legislating on matters involving the Nation (MUSCOGEE (CREEK) CONSTITUTION, art. VI, and § 7, sub. § E), and the creation by the National Council of courts inferior to the Muscogee Supreme Court. Id. at art. VII, § 1. The Judicial Power of the Muscogee Nation is vested in one Supreme Court. Id. at art. VII, and § 1. Constitutional duties of that Court include establishing procedures to insure that an appellant receives due process of law, and prompt, speedy relief. Id. at art. VII, § 3.

The essence of the solemn promises of the United States government to the Nation guaranteeing its inherent right to self-government remains binding upon the United States. See *Harjo v. Kleppe, 420 F. Supp. 1110, 1143 (D.D.C. 1976).* The Muscogee people are entitled to democratic self-government. *Harjo v. Andrus, 581 F.2d 949, 954 (D.C. Cir. 1978)* (citing **[*209]** *Harjo v. Kleppe, 420 F. Supp. at 1144).* Muscogee governmental legitimacy is the logical and just result of the persistent and successful political struggle of the Muscogee Nation lasting more than a century. The Muscogee Nation is a national government capable of exercising sovereign governmental authority and regulatory jurisdiction over its original land base conferred in fee simple in the Removal Treaty of Mar. 24, 1832 (7 Stat. 366), and the Treaty of June 14, 1866 (14 Stat 785).

In the alternative, even if the language in the OIWA general repealer clause is ambiguous in regard to the presidential approval requirement in the Curtis Act and Five Tribes Act, the language should be construed to abolish that power because its only purpose was to coerce the tribes to assimilate. The trust relationship between the federal government and the states requires courts to construe statutes in the manner most beneficial to the tribe. See *Carpenter v. Shaw, 280 U.S. 363 (1930).* Therefore, even if the language in the OIWA is ambiguous, this Court should find that the general repealer clause of the OIWA repeals the earlier language in prior Acts which was so adverse to Muscogee Nation self-government. This Court should find that the continuation of such a requirement is inconsistent with Muscogee Nation political legitimacy, and the current federal Indian policy of self-determination and government-to-government relationships.

II. The Muscogee (Creek) Nation maintains Jurisdiction Over Waters Within Nation Territory Which Includes the Arkansas River under Either the Doctrine of Non-Mutual Collateral Estoppel or the Winter's Doctrine.

Under the doctrine of non-mutual collateral estoppel, the city of Tulsa is precluded from asserting any claim against the Muscogee Nation for that portion of the Arkansas River running over the riverbed within Muscogee Nation territory. The doctrine of collateral estoppel, or issue preclusion, applies when: 1) the party or privy against whom the defense is raised in a different cause of action; 2) has already had the opportunity to actually litigate an ultimate fact or issue; 3) which was necessary to the determination of a final judgment in an earlier action. See *Parklane Hosiery Co. v. Shore, 439 U.S. 322, 325 (1979).*

Federal courts use federal preclusion doctrines when determining the estoppel effects of a prior judgment from a federal court. See *Hardy v. Johns-Manville Sales Corp., 681 F.2d 334 (5th Cir. 1982).* Because Federal courts no longer require mutuality to apply collateral estoppel, application of the doctrine is appropriate in this case so long as the other elements of that doctrine are met. See *Parklane, 439 U.S. at 325 (1979).*

In this case, Tulsa is arguing for state rather than Muscogee Nation water rights, and thus is acting as a privy of the state of Oklahoma. In *Choctaw Nation v. Oklahoma, 397 U.S. 620 (1970),* Oklahoma challenged treaty language from the Choctaw and Cherokee treaties which was identical to the language in the Creek Treaty of 1866. *Id. at 652.* That case determined that **[*210]** the language in the treaties between the U.S. government and the Five Civilized Tribes granted title in fee to portions of the Arkansas River and riverbed running through those Indian Nations' territories. Id.

Once the elements of collateral estoppel are met, as they are in the present case, the party resisting preclusion must prove: 1) the party seeking to apply collateral estoppel could have easily joined the earlier litigation; 2) that a full and fair opportunity to litigate the ultimate issue was not provided. See *Parklane, 439 U.S. at 326.* The Muscogee Nation is a sovereign entity with political processes which must be followed before a decision to join in litigation can be made. In this case, it would not have been easy for the Nation to join the earlier litigation in a timely manner. In addition, Oklahoma had every incentive for a vigorous defense in Choctaw Nation, and litigated the issue all the way to the United States Supreme Court. There can be no question that Oklahoma was afforded a full and fair opportunity to litigate the fee ownership of the Arkansas riverbed that was granted to any of the Five Civilized Tribes in their treaties. The binding effect of this judgment applies to Oklahoma and any privy. To allow Tulsa to dispute identical language in the Muscogee Nation treaty which this Court has already ruled on would directly undermine the compelling reasons courts apply the doctrine of preclusion. It would result in inconsistent rulings, and allow Oklahoma through its privy to collaterally attack an earlier final judgment. This court should apply the doctrine of collateral estoppel to Tulsa's claim against the Muscogee Nation for that portion of the Arkansas River riverbed running through Muscogee Nation territory, and hold that the Nation retains jurisdiction over that section of the Arkansas riverbed at issue in this case. Because the Muscogee Nation maintains territorial control of the Arkansas riverbed, the water running over it is within Indian Country and appropriate for regulation by the Muscogee Nation.

In the alternative, if the court rejects the compelling reasons for application of collateral estoppel in this case, the Muscogee Nation still retains its reserved water rights in the Arkansas River under Winter's doctrine. In addition, the Muscogee Nation also retains inherent authority under the Winter's doctrine to regulate the quality of that water for the benefit of the health and welfare of the Nation's people.

The Winter's Doctrine establishes that water was reserved for the Muscogee Nation in 1832 when the land was set aside in fee simple title for Nation territory. See *Winters v. United States, 207 U.S. 564, 577 (1908).* The Winter's Doctrine establishes an implied reserved right of Indian tribes to a quantity of water at the time a reservation is established so that reservation environments are habitable. Id. In Oklahoma, from the time of statehood until 1978 it was wrongly assumed that there were no Indian reservations. CLINTON, NEWTON & PRICE, AMERICAN INDIAN LAW: CASES AND MATERIALS, 1164 (1973), The Michie Company (1991). It has since been held, however, that under the plain language of the Indian Country statute **[*211]** Indian allotments held in trust by the United States or in fee by member Indians can also be Indian Country. See *State v. Littlechief, 573 P.2d 262 (Okla. 1978)* (interpreting *18 U.S.C. § 1151*(c) (1976)). This ruling is equally applicable to restricted allotments of the former Indian Territory in Eastern Oklahoma. See *State v. Burnett, 671 P.2d 1165, 1167 (Okla. Crim. App. 1983)* (Indian country includes all Indian allotments with title not extinguished, including rights-of-way running through the same).

Until recently, Oklahoma had been thought of as lacking Indian land with "reservation" status because Oklahoma tribes held land in fee simple title. See generally *Ex parte Nowabbi, 61 P.2d 1139 (Okla. Crim. App. 1936).* That erroneous theory has since been expressly overruled. See *State v. Klindt, 782 P.2d 401 (Okla. Crim. App. 1989).* Despite subsequent turmoil resulting from, among other things, assimilationist policies and erratic swings in federal Indian policy, there are still lands within the exterior boundaries of the 1866 Muscogee Nation territory under Muscogee Nation jurisdiction pursuant to the patents and promises dating back to treaties between the Nation and the U.S. government. See *Indian Country, U.S.A., Inc. v. State of Oklahoma ex rel. the Oklahoma Tax Commission, 829 F.2d 967, 972 (1987).*

The test for Indian Country is not whether the Indian land is called a "reservation," but whether or not the land was validly set aside for Indian tribes. See Citizen Band of Potawatomi Indian Tribe v. Oklahoma Tax Comm'n, 498 U.S.505 (1991). See also *United States v. Pelican, 232 U.S. 442, 449 (1914)* (defining Indian Country). The Mackey Site in question in this case is part of the original treaty land of the Muscogee Nation, and is the primary site of economic development and the ceremonial for which the WQS in question have been promulgated. The Tenth Circuit Court of Appeals has concluded that the Mackey Site is the purest form of Indian country; that it is land validly set apart for the use and benefit of the Muscogee Nation. See *Indian Country, U.S.A., Inc., 829 F.2d at 976.*

Thus, when land was validly set aside in fee simple for the Muscogee Nation in 1832, and because that land is Indian country and has not been disestablished or diminished, Winter's water rights were reserved for the Muscogee Nation as well. This valid set aside occurred long before Oklahoma became a state. Moreover, Oklahoma disclaimed any state jurisdiction, right, or title over Indian lands and Congress expressly preserved Federal authority over those lands when Oklahoma became a state. See Oklahoma Enabling Act, June 16, 1906, § 3, 34 Stat. 270, 269 (expressly reserving federal and tribal jurisdiction over Indians, their lands, and property). Only the tribal or federal governments, not the state, can extinguish this jurisdictional power. Id. Further, Oklahoma has not taken any affirmative legislative action to assume jurisdiction under Public Law 280, and has not repealed the disclaimer of jurisdiction over Indian country contained in the CONSTITUTION OF THE STATE OF OKLAHOMA, art. I, § 3.

[*212] Moreover, assertion of state jurisdiction under the Clean Water Act (CWA) requires that a state apply for EPA delegation of authority by demonstrating adequate legal authority over Indian lands. See *40 C.F.R. § 123.23(b)* (1993). The state of Oklahoma tried to demonstrate such legal authority in regard to the CWA, but later voluntarily withdrew its assertion. See *47 Fed. Reg. 27, 273-74* (upon EPA recommendation, Oklahoma expressly withdrew its assertion to demonstrate legal authority to regulate activities within Oklahoma Indian Country). Oklahoma has acquired EPA delegation of regulatory jurisdiction over the Five Civilized Tribes in Eastern Oklahoma under the Underground Injection Control program, which contains an express clause allowing for such assumption of jurisdiction. Id. Because Oklahoma has withdrawn its application for legal authority over the Five Civilized Tribes, including the Muscogee Nation, with regard to the CWA, the presumption is that federal and tribal regulatory jurisdiction controls.

In addition, by applying directly to the EPA for renewal of its NPDES permit, Tulsa has implicitly acknowledged that it is located within territory not subject to state jurisdiction. The state of Oklahoma was granted NPDES permitting authority in 1996, and now has jurisdiction over the granting and renewing of OPDES permits within state jurisdiction. By going to the EPA to renew its permit, Tulsa is acquiescing to continued federal jurisdiction, which is only appropriate where the state permitting authority does not have jurisdiction to function. Consequently, by its actions Tulsa is affirming that the territorial boundaries of the Muscogee Nation still control, and within those boundaries either federal or tribal regulatory jurisdiction applies.

There are no cases bearing directly on the issue of the level of quality reserved water must meet. But several cases have demonstrated a trend toward validating the concept that the need for water quantity in a reserved water right may also implicitly contain a standard for water quality as indispensable to make Indian lands habitable and fulfill the purposes of the reservation. This Court has held that the creation of an Indian reservation by the Federal government implies an allotment of water necessary to make the reservation livable. See *Arizona v. California, 373 U.S. 546, 599 (1963)* (overruled on other grounds). See also *Arizona v. California, 460 U.S. 605, 609 (1983).* In *United States v. Gila River Irrigation Dist., 804 F. Supp. 1 (D. Ariz. 1992),* the court enjoined non-Indian irrigators from diverting the river flow, as the resultant salt content in the river was a detriment to the tribe's right to the natural flow of the river. This Court has also suggested an implicit element of water quality in cases when the Federal government withdraws land from the public domain for a federal purpose, requiring that unappropriated water appurtenant to land is reserved to the extent needed to accomplish the purpose of the reservation. See *Cappaert v. United States, 426 U.S. 128, 137 (1976).*

In this case, the Muscogee Nation has promulgated WQS under the auspices of the EPA in order to conduct ceremonies to enhance its economic **[*213]** development. Following the logic of the preceding cases, since the Muscogee Nation lands, riverbed and waters have been reserved in fee simple for the purpose of providing a homeland for the Nation, this water must be of such quality, as well as quantity to be able to support the Muscogee Nation. The reservation of Muscogee Nation territory must have included both adequate water quantity and quality so that the Muscogee people could live on their lands forever.

In addition, no language in the Curtis Act or the Five Tribes Act indicates that Congress sought to affect or limit Muscogee Nation water rights. In fact, neither of these acts contains any indication whatsoever that Congress even considered the water rights of any of the Five Civilized Tribes. When the Dion test is applied to the facts in this case, this Court must find that the Muscogee Nation has not been disestablished with regard to its property rights in the Arkansas River. Further, given the total lack of language indicating Congressional consideration of Muscogee Nation water rights, it would be impossible for Tulsa to meet the Solem test to find diminishment of Nation rights in the Arkansas River.

III. The Muscogee (Creek) Nation Meets EPA Criteria to Qualify for TAS, and the EPA'S Approval of the Nation's TAS Application Is Valid.

The purpose of the Clean Water Act (CWA) is to establish a comprehensive federal statutory scheme to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." See Clean Water Act § 101(a), *33 U.S.C. § 1251*(a) (1988). Historically, the CWA excluded explicit or implicit reference to Tribes and any potential tribal role in helping to fulfill the purposes of the CWA by protecting water quality in Indian Country. See CWA § 502(3), *33 U.S.C. § 1362*(3) (1988) (definition of "State" excluding reference to Tribes). However, states were precluded from exercising regulatory jurisdiction on Indian trust lands under general principles of federal Indian law. See *California v. Cabazon Band of Mission Indians, 480 U.S. 202, 216, n.18 (1987).* This legislative omission resulted in unregulated zones on tribal lands, a substantial impediment to fulfillment of the goals of CWA. To rectify this situation, the 1987 Congress amended the CWA, expressly authorizing the EPA Administrator to treat qualifying tribes as states (CWA § 518 (codified at *33 U.S.C. § 1377*(e) (1988)) for the purposes of promulgating § 303 Water Quality Standards (WQS) (codified at *33 U.S.C. § 1313*(a)). Congress has recognized the important role of tribes in cleaning up the nation's waters.

By congressional statute, the EPA can delegate CWA program implementation to Tribes for Treatment As State (TAS) for protection of water quality in Indian Country if the tribe demonstrates these threshold criteria: 1) the Indian tribe has a governing body carrying out substantial governmental duties and powers; 2) the functions to be exercised by the Indian tribe pertain to the management and protection of water resources that **[*214]** are held by an Indian tribe, held by the United States in trust for Indians, held by a member of an Indian tribe if such property interest is subject to a trust restriction on alienation, or are otherwise within the borders of an Indian reservation; and 3) the Indian tribe is reasonably expected to be capable, in the EPA Administrator's judgment, of carrying out the functions to be exercised in a manner consistent with the terms and purposes of CWA and of all applicable regulations. See *33 U.S.C. § 1377*(e) (1988). Congress established the TAS program as a rational means to achieve water quality on tribal lands, and its methods are entitled to great judicial deference. See *Williamson v. Lee Optical Co., 348 U.S. 483 (1955).*

Pursuant to section 518, EPA promulgated five regulations advancing criteria by which EPA will approve tribes for TAS for various CWA programs. EPA regulations establish the basic requirements a Tribe must meet in order to qualify for treatment as a State. See *40 C.F.R. § 131.8(a)* (tribal qualifications for TAS status for water quality standards) and (b) (tribal application requirements). The EPA determined that the Muscogee Nation met each of the required criteria under the CWA that authorized the EPA to treat it as a state for promulgation of CWA § 303 Water Quality Standards (WQS) (codified at *33 U.S.C. § 1313*(a)). In making this determination, the EPA was carrying out its statutory duty pursuant to the 1987 congressional amendments to the CWA expressly defining "States" in CWA to include "Indian Tribes that qualify for treatment as a state for the purpose of water quality standards." See *40 C.F.R. § 131.3* (1991). In light of the Agency's statutory responsibility for implementing environmental statutes, its interpretation of the intent of Congress in allowing for tribal management of water quality within the Muscogee Nation is entitled to substantial deference. See *Washington Dept. of Ecology v. EPA, 752 F.2d 1465 (9th Cir. 1985).* See also *Chevron, USA v. NRDC, 467 U.S. 837 (1984).*

A. The Muscogee Nation Is a Federally Recognized Tribe.

The Muscogee Nation is federally recognized by the Secretary of the Interior in the U.S. Department of the Interior as an autonomous Indian tribe. *63 Fed. Reg. 71,943* (Dec. 30, 1998). As a federally recognized tribe, the Muscogee Nation fulfills this requirement for TAS status under CWA.

B. The Muscogeee Nation is Reasonably Capable of Carrying Out the Functions of an Effective WQS Program.

The EPA Administrator correctly determined that the Muscogee Nation is reasonably capable of carrying out the functions of an effective WQS program under CWA § 303. (Jt. App. 3) The Nation participates in the Inter-Tribal Environmental Council of Oklahoma based in Tahlequah, Oklahoma. As a member of that organization, the Muscogee Nation has access to technical assistance from the Office of Environmental Services. Moreover, the EPA provides technical assistance to tribes through publication of a Reference **[*215]** Guide to Water Quality Standards for Indian Tribes 4 (Jan. 1990). Tribes qualifying for TAS status can receive funding to carry out their water quality provisions. *33 U.S.C. § 1377*(e), § 104 (Research, Investigation, and Training), and § 106 (Grants for Pollution Control). Pursuant to TAS authority, these resources are available and confirm the Muscogee Nation's ability to reasonably administrate an effective WQS program.

C. The Muscogee Nation Has an Independent Governing Body that Includes Separation of Powers Between Three Branches of Government, Each Capable of Carrying Out Substantial Governmental Duties and Powers.

As described above, the Muscogee national government is a constitutional, tripartite government, effectively fulfilling executive, legislative, and judicial functions with internal separation of powers. See *Muscogee (Creek) Nation, 670 F. Supp. at 443.* The Muscogee Nation and its tripartite government has successfully survived attempted statutory dismemberment and continues to effectively govern for the health and welfare of its people, and acts independently of any requirement for presidential approval.

Under the CWA, the EPA appropriately delegated to the Muscogee Nation regulatory authority to promulgate § 303 Water Quality Standards. In support of primacy for tribal governments in managing reservation environmental programs, the EPA has a policy to avoid checkerboarding and fractionalization of reservations into trust and fee lands. In this case, the EPA exercised its administrative authority consistently with EPA regulations and in a manner not contrary to law in granting TAS status to the Muscogee Nation for the purposes of establishing water quality standards. The EPA's decision in this case is supported by the administrative record, and is due deference from this Court.

Conclusion

The Muscogee Nation and EPA Administrator, Carol Browner, request that the Supreme Court uphold the decision of the Court of Appeals that the EPA's CWA § 303 water quality program delegation to the Muscogee (Creek) Nation is valid and enforceable.

FOOTNOTES:

n1 Otherwise, the Court has established a definition of "Indian character" which might, depending on a particular tribe's history, result in a different constitutional standard for differing tribes.

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Winters in the East: Tribal Reserved Rights to Water in Riparian States

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SUMMARY: ... In the eastern United States, the riparian system of state water rights developed on the predicate of sufficient water to go around. ... The first fundamental principle of tribal reserved water rights is that when Indian country is established, that act implicitly reserves for the use of the tribe that amount of water which is needed to fulfill the purposes for which the land was set aside. ... Because the appropriation system depends upon certainty in amount as well as priority in time, quantification of tribal reserved rights is necessary for Indian country in western states. ... Reserved rights to water for Indian tribes exist for two purposes: to allow tribes to continue pre-existing or aboriginal practices, particularly those food- gathering practices essential to the tribe, and to allow the purposes for which the reservation was created to be accomplished. ... Once the amount of the tribal reserved right is determined, it may simply be possible to add that amount to the minimum flow that is beyond riparian use. ... One possibility is to incorporate into state riparian law the doctrine that a riparian use that interferes with a paramount tribal reserved right is unreasonable per se. ... Another, related approach is to satisfy the tribal water right before any riparian rights arising subsequent to the tribal right. ...

TEXT: **[*169]**

I. Introduction

In the eastern United States, the riparian system of state water rights developed on the predicate of sufficient water to go around. Whatever the truth of that predicate in the past, an adequate supply of water for all uses may now be more myth than reality. Population pressures, industrial and residential expansion, years of severe drought, and an increased understanding of the necessity of preserving minimum instream flows have all served to restrict the water available for riparian use at the same time as demand for that water grows. Eastern states are responding to the potential for water shortage in various ways, with one of the most common responses being the adoption of some sort of permitting system for the assertion of riparian rights. <=2> n1 In their attempts to address the issue of riparian water rights in an era of limited water, however, eastern states have so far ignored one of the most important issues in fashioning an integrated system of water allocation: the rights of the Indian tribes to water as a matter of federal law.

With one partial exception, <=3> n2 Indian reserved rights to water have been litigated only for reservations located in states following the prior appropriation system of state water law rights. <=4> n3 Similarly, with one **[*170]** significant exception, tribal water rights settlements and compacts have been concluded only in the context of appropriation states. <=5> n4 With the exception of the Seminole Tribe in Florida, no Indian tribe has ever filed suit

in a riparian jurisdiction asserting its federal reserved rights to water. In short, despite the tightening of the eastern water supply, the issue of Indian water rights in riparian states has barely surfaced for either tribal governments or state water managers.

In consequence, tribes and states in the eastern United States are in danger of repeating one of the major mistakes made in the West. With the United States Supreme Court's 1908 decision in Winters v. United States, <=6> n5 western states were aware, or at least surely should have been aware, <=7> n6 that reservations of land for Indian tribes carried with them implied rights to water that could and usually did predate most non-Indian water rights. Yet those states generally ignored the teaching of Winters, acting with respect to the allocation of water to non-Indians as if the Court had never spoken. Little existed to nudge the states into taking account of tribal rights. The federal government, the nominal trustee for Indian lands and water rights, seldom pursued Indian water rights, <=8> n7 either in litigation or on the ground. The tribes themselves, struggling for their survival against devastating federal policies, <=9> n8 **[*171]** had neither the resources nor, often, the legal right to pursue their water claims in federal court. <=10> n9

Not until the 1970s did Indian tribes in western states began asserting their rights to water in substantial numbers. By that time, state law allocation systems were well-established and long-standing. Non-Indian rights to water, property rights under state law, had often been vested for decades, and non-Indians had made significant investments of time and money in the expectation that their state appropriation rights were secure. <=11> n10 The introduction of tribal water rights upset those expectations. Tribes asserted, and won, rights to considerable quantities of water with very early priority dates, raising the very real possibility that some established state law rights would be curtailed. <=12> n11 Not surprisingly, the resulting hostility from non-Indian water users and state officials has often been intense. <=13> n12

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It may already be too late to avoid the same sort of disruption and hostility in the eastern states. But it is certain that the longer it takes for the Indian tribes and the riparian states to recognize tribal reserved rights to water in the East and to accommodate those rights in the context of riparian systems, the more difficult the transition will be. The issue of tribal rights to water in eastern states will surface at some point. If tribes and states can start to address the issue now, perhaps much of the litigation and acrimony that have plagued Indian water rights in the West can be avoided.

This article examines the question of tribal reserved rights to water in riparian jurisdictions. <=14> n13 It begins by describing the fundamental principles of the tribal reserved rights doctrine, principles that transcend the specifics of the state law systems with which the reserved rights must be coordinated. Next, the article looks at how those fundamental principles of Indian reserved rights have been put into practice in prior appropriation states: that is, how those principles have been interpreted within the context of intertwining both reserved rights and appropriation rights into a workable whole. The third section of the article moves to the East, briefly delineating the basic differences between appropriation rights and riparian rights. This section also compares common law riparian rights to the rise of regulated riparian rights in many of the eastern states. Finally, the article considers Indian reserved rights in riparian jurisdictions. This involves both the basic question of whether tribal reserved rights to water exist outside appropriation states, as well as an exploration of some of the issues raised by trying to coordinate the principles of Indian reserved rights and the state law system of riparian rights. The article concludes that tribal reserved rights to water are as viable in the eastern United States as in the West, but that implementing those rights in the context of riparianism may involve some distinctions in the specific rules that govern the reserved rights doctrine in the West.

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II. Fundamentals of the Reserved Rights Doctrine

The doctrine of Indian reserved rights to water has developed against the backdrop of the state prior appropriation system with which tribal rights must be integrated in western states. With one partial exception, tribal water rights have been litigated only in appropriation states, and all water rights settlements except the Seminole Compact have occurred in western states as well. As a result, the leading treatise in the field asserts that tribal water rights "cannot be understood apart from the prior appropriation system." <=15> n14

Nonetheless, there is a distinction between the fundamental principles of the Indian reserved rights doctrine, which transcend the state law water rights systems, and the specifics of how Indian water rights are to be coordinated with state law water rights in the same body of water. The fundamental principles arise from the federal policies and purposes in creating reservations, the tribes' preservation of certain crucial and often expressly bargained-for aboriginal practices, and the federal trust responsibility to the Indian tribes. The specifics, on the other hand, arise from the practical necessity of creating a workable integrated system of federal and state-law water rights.

The fundamental principles of the Indian reserved rights doctrine are few and fairly easily stated. <=16> n15 For the most part, these foundation principles are embedded in the two early twentieth century Supreme Court cases addressing the concepts of reserved rights to resources: United States v. Winans <=17> n16 in 1905 and Winters v. United States <=18> n17 three years later.

[*174]

A. Water for Reservation Purposes

The first fundamental principle of tribal reserved water rights is that when Indian country <=19> n18 is established, <=20> n19 that act implicitly reserves for the use of the tribe that amount of water which is needed to fulfill the purposes for which the land was set aside. <=21> n20 These Winters rights exist as of the date of the creation of the Indian country. <=22> n21

The basis of this principle is simple: neither the tribes nor the federal government would have intended to settle Indian societies on confined tracts of land- too small to support the largely nomadic hunting way of life **[*175]** practiced by most tribes-without providing sufficient water to sustain the communities in their new life. <=23> n22 The proposition is so fundamental that it is implicit in the reservation of the land itself. No statement of an intent to reserve water is necessary; in fact, an express disclaimer of water rights would probably be required to defeat the reservation of water that accompanies the reservation of land. <=24> n23

There has been considerable litigation in western states regarding the purposes for which reservations were established. <=25> n24 Every court that has decided the issue has agreed on one purpose for all reservations: the creation of an agrarian and settled society. <=26> n25 The federal reservation policy was designed both to separate potentially hostile tribes and settlers, and to provide a laboratory setting where the tribes could learn the virtues of civilization, including agriculture, English, Christianity, and private property. <=27> n26 Based on this generalized but clear intent on the part of the government that Indian reservations were created in part to "agrarianize" tribal communities, agriculture is universally recognized as a purpose for which reservations were set aside.

Beyond agriculture, there is far less judicial agreement on the purposes of Indian reservations. Some courts broadly interpret the federal purposes in creating reservations, finding an intent to create not merely an agrarian society, but a homeland <=28> n27 where the tribes are guaranteed a **[*176]** "measured separatism" <=29> n28 from the majoritarian society. Other courts reject the homeland concept, finding that the sole purpose for a reservation is agricultural. <=30> n29 Where agriculture is deemed the sole purpose of a reservation, however, the courts have conceded that water for domestic and other uses is encompassed within the agricultural purpose, <=31> n30 implicitly recognizing that reservations exist not merely to provide fields and pastures, but also to provide a place for tribal communities to live.

Regardless of the particular court's approach to interpreting the purposes of a given reservation, the general principle that sufficient water is reserved to fulfill those purposes remains undisturbed. The judicial disagreements arise over the construction of the purposes, and not the basic concept that water is impliedly reserved for those purposes.

B. Water for Aboriginal Practices

The second fundamental principle is that when Indian tribes reserve for themselves the right to continue pre-existing or aboriginal practices such as fishing, hunting, gathering, and historical agriculture, whether inside their Indian country or off-reservation, that act implicitly reserves as well sufficient water to support that tribally reserved activity. <=32> n31 These rights exist as of time immemorial. <=33> n32

The basic idea of the second principle is as simple as that of the first principle: tribes would not have bargained to continue pre-existing or aboriginal food practices without an understanding that the water necessary to allow those practices would be available. <=34> n33 Tribes would not, for example, have ensured their perpetual right to fish at their usual and accustomed fishing grounds if they believed that non-Indians could de-water the rivers.

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These aboriginal-practice rights differ from rights reserved by implication of a land reservation in their date of creation. <=35> n34 When land was set aside for Indian tribes, sufficient water was impliedly reserved to fulfill the purposes for which the federal government created the reservation. <=36> n35 Because those federal purposes came into existence at the creation of the land-reservation, so too did the water rights. <=37> n36 But when tribes reserved the right to continue aboriginal practices, and impliedly reserved as well sufficient water, the purpose for which the water was reserved was not created with the land-reservation, but rather was a pre-existing practice of the particular tribe. The water rights that accompany aboriginal practices thus exist, as does the practice that the water is supporting, as of time immemorial. <=38> n37

There is some disagreement about whether these aboriginal-practice water rights are more directly traceable to the 1908 Winters decision, <=39> n38 which held that water rights implicitly accompany the reservation of land, <=40> n39 or to the 1905 Winans case, <=41> n40 which held that the reservation of aboriginal practices implicitly reserves as well those rights necessary to the accomplishment of **[*178]** the practices. <=42> n41 Professor Michael Blumm, in the leading water law treatise, advocates the second position, <=43> n42 and finds some substantial support in the Ninth Circuit's Adair decision. <=44> n43 Other Ninth Circuit opinions, however, have seemed to assume that a continuation of aboriginal practices is one purpose for which some reservations were created, an approach more consistent with the Winters decision. <=45> n44 Regardless of the precise basis of aboriginal-practice water rights, however, a tribal reservation of the right to continue pre-existing practices implicitly reserves sufficient water to ensure that the practices in fact continue.

Nonetheless, and in direct contradiction to the Adair decision, <=46> n45 the Idaho state judge in charge of the Snake River Basin Adjudication (SRBA) <=47> n46 **[*179]** recently ruled that the Nez Perce Tribe did not hold any water rights in connection with its treaty-reserved rights to fish outside its reservation borders. <=48> n47 Improperly distinguishing between on-reservation and off-reservation pre-existing uses of water, the court refused to extend the implied-reservation-of-water doctrine to aboriginal practices reserved in aboriginal territory not made part of any reservation. <=49> n48

C. Paramount Nature of Tribal Reserved Rights

The third fundamental principle of Indian water rights is that tribal reserved rights to water are, as a matter of federal law, protected against interference by subsequent non-Indian uses of water. <=50> n49 This principle is simply necessary to give effect to the first two.

First, the federal government has the constitutional power to set aside water for tribal use. This power arises primarily from the federal commerce power, which authorizes Congress to act both with respect to the waters and **[*180]** the Indian tribes, supplemented by the property clause. <=51> n50 Under the interstate commerce clause, <=52> n51 Congress retains authority over the navigable waters <=53> n52 even when the beds of those waters pass to the states upon their admission to the Union. <=54> n53 Moreover, the Indian commerce clause accords full authority over Indian affairs to the federal government, <=55> n54 limiting state power over Indians, Indian lands, and Indian tribes to those situations where Congress has authorized the states to act or a state can show "exceptional circumstances" that mandate state action. <=56> n55 In instances where Indian **[*181]** reservations are created from the public domain, the federal power to regulate those lands pursuant to the property clause also supports the implied reservation of water rights. <=57> n56

Second, the rights reserved to or by tribes were reserved in perpetuity. Reservations were set aside as permanent homelands for the tribes, offering the protection of a "measured separatism" from the surrounding American culture. <=58> n57 Only Congress can create an Indian reservation, and only Congress can diminish or disestablish an Indian reservation. <=59> n58 The purpose-of-reservation water rights that attach to an Indian reservation thus exist unless **[*182]** and until Congress chooses to terminate the land reservation. Similarly, existing uses reserved in treaties and agreements were generally reserved forever. <=60> n59 Only Congress can abrogate treaties and agreements with the Indian tribes and extinguish the pre-existing tribal uses that those documents reserved to the tribes. <=61> n60 Moreover, although Congress has the power to terminate reservations and abrogate treaties, congressional intent to do so must be clearly expressed. <=62> n61

It follows, then, as a matter of federal Indian law, that until or unless Congress acts unmistakably to extinguish tribal water rights, those rights persist. It also follows that, as a matter of basic federalism, nothing in state law can operate to the derogation of those federal-law tribal rights. Tribal water rights are, therefore, paramount over subsequent state-law water rights. <=63> n62

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D. Tribal Rights Survive Non-use

The fourth fundamental principle is that tribal reserved rights to water are not forfeited or abandoned by non-use. <=64> n63 The necessity for this principle arises in part from the conditions of most Indian reservations in the decades after they were created. Tribes themselves were struggling to maintain their cultural and political integrity in the face of federal policies geared toward assimilation of Indians and the eventual disintegration of the tribes. <=65> n64 No tribal funds existed for water projects, and federal money primarily funded non-Indian irrigation projects, often to the detriment of Indian lands. <=66> n65 If tribal water rights were dependent upon putting the reserved water to use within a given period of time, those rights would have had little meaning.

III. Implementing Tribal Reserved Rights in Appropriation States

Congress, federal and state courts, state water agencies, and Indian tribes themselves have addressed the issues surrounding tribal water rights almost exclusively against the backdrop of the prior appropriation system of western state water law. The Supreme Court has succinctly described the basic attributes of the prior appropriation system:

Under that doctrine, one acquires a right to water by diverting it from its natural source and applying it to some beneficial use. Continued beneficial use of the water is required in order to maintain the right. In periods of shortage, priority among confirmed rights is determined according to the date of initial diversion. <=67> n66

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Because the prior-appropriation system developed in arid climates where water is at a premium, it values certainty and predictability. All appropriators have a right to a certain quantity of water with a priority date of use. <=68> n67 Under the "first in time, first in right" principle, junior appropriators must forego their water rights in favor of senior appropriators in times of shortage. <=69> n68

When tribal reserved rights to water are determined for Indian country in prior appropriation states, those reserved rights must be meshed with the state-law appropriation rights into a workable integrated whole. As a result, the fundamental principles of the reserved rights doctrine are applied in particular ways in western states to create that integrated system. More specifically, tribal reserved rights to water in appropriation states are quantified and assigned priority dates. <=70> n69 With those two applications, water managers can ensure that non- Indian state-law rights do not interfere with prior tribal rights and vice versa.

A. Priority Dates

For a state-law appropriator, the priority date is the date on which water is diverted and put to a beneficial use as defined by state law. <=71> n70 For tribal reserved rights, the priority date is the date on which the water right came into being. Thus, for water reserved to fulfill the purposes for which the land reservation was set aside, the tribal priority date is the date of the creation of the reservation. <=72> n71 For water reserved to preserve existing aboriginal uses and practices, the tribal priority date is time immemorial. <=73> n72 **[*185]** Assigning these priority dates to tribal rights allows Indian water rights to be slotted in to the rank order system of prior appropriation states.

B. Quantification

Because the appropriation system depends upon certainty in amount as well as priority in time, quantification of tribal reserved rights is necessary for Indian country in western states. The method of quantifying tribal water rights depends upon the type of reserved right at issue.

For water needed to fulfill the agricultural purposes for which reservations were created, the primary quantification measure for reserved rights is also an agricultural measure. Tribes are entitled to sufficient water to irrigate all of the practicably irrigable acreage (PIA) of the reservation, <=74> n73 a determination that involves soil science, engineering, and economics. <=75> n74

For water reserved to continue aboriginal uses, the quantification measure varies with the circumstances. Where the aboriginal practice of the tribe was agriculture, the quantification of reserved water is that amount of water historically used for irrigation. <=76> n75 Where the aboriginal use is a food- gathering practice such as fishing, the quantification standard is the amount of water "necessary to maintain" the conditions that support the practice. <=77> n76 In the case of fishing rights, for example, the reserved water right is the quantity needed to maintain the fisheries, whether that amount is based on minimum stream flow or water temperature or some other factor. <=78> n77

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IV. Differences in Riparian Law

States east and one tier west of the Mississippi River, those in the humid areas of the country, use some form of riparian rights rather than the prior appropriation system of the west. <=79> n78 The primary focus of common-law riparian rights is reasonable use: <=80> n79 all riparian owners <=81> n80 have the right to make a reasonable use of the water, and no riparian may unreasonably interfere with the rights of any other riparian. <=82> n81 These common-law correlative rights, however, are gradually being replaced by regulated riparianism, with about half the eastern states now exercising some form of state regulation of riparian rights. <=83> n82 This section will look first at common-law correlative rights and how they differ from prior appropriation doctrine, and then turn to the more recent development of regulated riparianism.

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A. Common-Law Riparian Rights

Common-law riparianism differs from prior appropriation in at least three aspects that may affect the specific implementation of tribal reserved water rights. Two of these distinctions arise from the correlative nature of riparian rights, and the third from the way in which riparian rights are implemented and enforced.

First, riparianism does not include the feature of temporal priority of rights. Riparian rights are not ordered by the date of first use, but by the correlative right of reasonable use. <=84> n83 A central feature of riparianism is the right of the riparian owner to initiate a reasonable use of the water at any time. <=85> n84 Scholars disagree about the extent

to which pre-existing exercises of riparian rights are in fact judicially protected against later exercises, <=86> n85 but temporal priority is technically not a principle of common law riparian rights.

Second, riparian rights are generally not quantified. The doctrine of correlative rights-that every riparian owner has a right to make a reasonable useof the water at any time, so long as that use does not interfere with the rights of other riparians <=87> n86-necessarily introduces uncertainty and a lack of predictability into the riparian system. A riparian owner has a right to use not a specific quantity of water, but that amount of water that is reasonable under the circumstances, taking account of the correlative reasonable use rights of all other riparians on the watercourse. <=88> n87 What constitutes a reasonable use **[*188]** quantity is thus potentially subject to change in light of subsequently initiated riparian uses. <=89> n88

Third, riparianism has no system of administrative oversight. In the western appropriation states, water rights are administered by state agencies. <=90> n89 Rights must be perfected, in part by registering the right with the appropriate state agency. <=91> n90 The agency records water rights, monitors water use, and takes action where necessary to protect users with earlier priority dates. In eastern riparian systems, under the common law, there is no administrative oversight of or involvement in water rights. <=92> n91 Instead, implementation and enforcement of riparian rights are accomplished through private lawsuits. <=93> n92 Any claim of an interference with riparian rights is addressed in the courts through a lawsuit filed by an injured riparian owner. <=94> n93

B. Regulated Riparianism

Increasingly, common-law riparianism is giving way to a system of regulated riparianism. Some form of state regulation of riparian rights now exists in about half the riparian states, <=95> n94 and the American Society of Civil Engineers has developed The Regulated Riparian Model Water Code. <=96> n95 Although existing regulatory systems differ widely, and thus any generalizations are necessarily overbroad, some general trends can be noted **[*189]** by examining common features of state regulatory schemes and the Model Code.

Of particular interest to the eventual coordination of tribal reserved rights, regulated riparian systems often institute a permit system for the exercise of riparian rights. <=97> n96 A riparian owner wishing to make use of the water, especially a consumptive use, petitions a state agency for a permit to use a specified quantity of water. <=98> n97 The agency will grant the permit based on a number of state-law factors, including whether the proposed use is "reasonable" (an incorporation of the common-law standard). <=99> n98 If the agency grants a permit, the use right is not perpetual but for a term of years, although the number of years varies from state to state. <=100> n99

Regulated riparianism thus introduces into eastern state water law two of the central features of prior appropriation: quantification <=101> n100 and some measure of temporal priority. Although temporal priority is not a stated feature of regulated riparianism, some degree of it is inherent in the system. First, existing uses may be exempt from the permit requirement, <=102> n101 essentially **[*190]** granting those uses a permanent priority over new uses. Second, the agency must determine that a proposed use is not only reasonable, but that any withdrawal "in combination with other relevant withdrawals, will not exceed the safe yield of the water source." <=103> n102 If the water available in a particular watercourse over and above the safe yield is adequate for all proposed withdrawals, then no temporal priority is involved. But if a sufficient amount of water is not available, then later-proposed withdrawals may be denied or curtailed because the permits already granted have left insufficient water to safely allow the newly proposed uses.

<=104> n103 In cases of an inadequate water supply for all proposed uses, then, regulated riparianism necessarily introduces a measure of first-in-time.

Nonetheless, the temporal priority of regulated riparianism differs in material respects from that of prior appropriation. Most importantly, the right is usually temporary, running only for the term of years of the permit. <=105> n104 There is no right of automatic permit renewal; a subsequent permit to continue a use requires a redetermination of the relevant factors, including whether the use is reasonable in light of other withdrawals, although renewal of a permit for an existing use can be favored over competing proposals "if the public interest is served equally" by both uses. <=106> n105 In addition, in times of **[*191]** water shortage, permit holders do not have priority of right based on first-in-time with respect to other permit holders. Instead, the state agency is empowered to restrict the terms and conditions of any permit in light of state drought management strategies and in accordance with the preferences for water use. <=107> n106 The temporal priority of regulated riparianism is thus far from the strict first-in-time, first-in-right doctrine of the western states, but regulated riparianism does nonetheless impose some form of the temporal priority concept so foreign to common- law riparian rights.

V. Tribal Reserved Rights in Riparian States

The final consideration, undertaken in light of the distinctions between western and eastern state water law, is the question of tribal reserved rights to water in riparian jurisdictions. That consideration, in turn, involves two issues: first, whether the fundamental principles of tribal reserved rights apply in riparian states; and second, if they do, how tribal reserved rights and riparian rights can be integrated into a workable water law system.

A. The Fundamental Principles

The first issue is the application of the fundamental principles governing tribal reserved rights to water or, more simply, whether tribes have those rights in riparian states. The answer is an equally simple yes.

Reserved rights to water for Indian tribes exist for two purposes: to allow tribes to continue pre-existing or aboriginal practices, particularly those food- gathering practices essential to the tribe, and to allow the purposes for which the reservation was created to be accomplished. <=108> n107 Neither purpose is confined to a line west of the 100th meridian. The Chippewa of the western Great Lakes reserved to themselves the right to continue to hunt and gather the wild rice, even in their ceded territory, <=109> n108 as surely as the tribes of the Pacific Northwest reserved to themselves the right to continue to fish at their **[*192]** usual and accustomed places. <=110> n109 The federal government, doggedly pursuing a policy of turning Indians into yeoman farmers, intended one purpose of the Chippewa reservations in Michigan <=111> n110 to be agriculture as surely as it intended that purpose for the Wind River Reservation in Wyoming. <=112> n111 Eastern reservations were intended to be homelands for the tribes that occupied them no less than western reservations. <=113> n112

Professor Joseph Dellapenna has suggested that Indian tribes in riparian states should have only the same riparian rights as any state-law user. <=114> n113 The gravamen of his argument appears to be the notion that tribal reserved rights to water as litigated thus far are appropriative rights, and that appropriation rights do not work in a riparian system. <=115> n114 His initial premise, however, fundamentally misperceives the foundation of tribal reserved

rights to water. Tribal reserved water rights are not appropriation rights; <=116> n115 **[*193]** appropriative rights are the state law system used throughout the West. Instead, tribal reserved rights are neither appropriative nor riparian, but a third, distinct type of water right reserved as a matter of federal law. <=117> n116

Moreover, there are a number of other problems with Professor Dellapenna's approach. First, it would mean that tribal rights, as guaranteed by federal law, depend upon annual rainfall. Indian country in the east would carry fewer tribal rights than Indian country in the west. <=118> n117 Second, it would accord Indian tribes in riparian jurisdictions only those rights that they would have under state law. But the Court has stated definitively that federal law, not state law, determines tribal water rights. <=119> n118 And third, it would accord tribes only those rights the tribe would have if it were nothing more than a property owner. <=120> n119 Indian tribes, however, are not merely property owners **[*194]** within their reservations, but governments that entered into relations with the United States. Tribal reserved rights to water arise from the resulting treaties and treaty-substitutes. And the Court has been very clear that if an Indian tribe has nothing under a treaty that it would not have without the treaty, then the treaty is a nullity. <=121> n120 The Court will not assume that a tribe bargained for **[*195]** only those rights it would have had anyway, and it will not read treaties and treaty- substitutes as guaranteeing only those rights that tribes would have had under state law.

The fundamental principles of the federal reserved rights doctrine of tribal water rights thus should apply in the eastern United States as well as in the West. <=122> n121 Those principles ensure that tribes east of Kansas City <=123> n122 are guaranteed the same treaty and treaty-substitute rights, as a matter of federal law, as Indian tribes west of that point.

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B. Implementing Tribal Reserved Rights in Riparian Systems

Although the fundamental principles of tribal reserved water rights apply in eastern states the same as they apply in western states, the specific details of how to integrate tribal reserved rights with the state-law rights so that a workable system emerges may differ between appropriation and riparian jurisdictions. More particularly, the issues in riparian jurisdictions revolve around quantification of tribal reserved rights, and the administration and enforcement of a coordinated system.

The quantification of tribal reserved water rights in riparian states will depend upon the purpose for which water was reserved. Where a reservation was set aside to create an agrarian society, the measure of the water right will likely be the same as it is in the western states: practicably irrigable acreage, the shorthand measure for that amount of water needed to make the land productive for agricultural purposes. The Supreme Court has rejected a more indeterminate standard of "reasonably foreseeable needs," holding that "the only feasible and fair way by which reserved water for the reservations can be measured is irrigable acreage." <=124> n123 Where a reservation was set aside to preserve traditional agriculture, the western standard of historical water use may prove appropriate. And where a reservation was set aside to preserve other aboriginal practices, the measure of the water right will likely, again as in the West, be determined by the specific circumstances of the practice and the watercourse.

Nonetheless, the quantification of tribal rights allows for innovative approaches. In the prior appropriation jurisdictions, tribal reserved rights are nearly always quantified as a set amount: a specific number of acre feet or a flow of a specific number of cubic feet per second. <=125> n124 That kind of definite- amount quantification is generally necessary in prior appropriation jurisdictions in order to provide predictability and protection of junior users against arbitrary curtailment. Although set-amount quantification may prove to be advantageous in the East as well, other

approaches are possible in systems where the states do not prize certainty as highly as western states do. For example, the Seminole Tribe of Florida negotiated a compact that provides for a tribal water right of fifteen percent of the available water from **[*197]** specified sources, rather than a set amount. <=126> n125 The flexibility offered by apportionment as a percentage of available water, or as a percentage subject to a fixed minimum amount, may in some cases better serve both tribes and states.

Once the tribal water right is determined-whether as a determinate or indeterminate amount, or some combination-that right must then be coordinated with state-law riparian rights to establish a workable integrated system. That coordination presents different issues in regulated riparian and in common-law riparian jurisdictions.

Certainly integrating tribal reserved rights in a regulated riparian jurisdiction poses fewer administrative headaches than doing so in a common-law riparian state. Regulated riparianism necessarily introduces into riparian jurisdictions concepts of quantification and temporal right. <=127> n126 Water use permits specify a quantity of water that the riparian owner may use for a specified term of years, with an upper limit on the combined riparian uses of a watercourse in order to protect the safe yield or minimum water levels of the source. <=128> n127 Once the amount of the tribal reserved right is determined, it may simply be possible to add that amount to the minimum flow that is beyond riparian use. <=129> n128 In other words, the water available for riparian use permits would be the available water in a source over and above the safe yield plus tribal reserved rights. That approach would guarantee the paramount and perpetual nature of tribal water rights and, at the same time, minimize the burden of administering a coordinated system.

Integrating tribal reserved rights into a workable system in a common-law riparian jurisdiction will undoubtedly prove more difficult. Much of the difficulty arises from the attempt to coordinate a set of quantified rights for tribes with a set of correlative rights for riparian owners. Tribal reserved rights cannot be subject to correlative use, however, without destroying the paramount nature of those rights and allowing state law to trump federal rights. The issue then becomes how to integrate the two types of rights.

One possibility is to incorporate into state riparian law the doctrine that a riparian use that interferes with a paramount tribal reserved right is unreasonable per se. Reasonableness of use among state-law riparian users **[*198]** would continue to be determined according to common-law principles, <=130> n129 but a kind of strict liability would apply to interference with paramount tribal rights.

Another, related approach is to satisfy the tribal water right before any riparian rights arising subsequent to the tribal right. <=131> n130 In case of water shortage, the burden would be allocated among the riparian users. <=132> n131 Professor Michael Blumm suggests that this approach is consistent with the reserved rights doctrine because it protects the paramount nature of the tribal rights. <=133> n132 It is also consistent with the correlative nature of common-law riparian rights, which has traditionally allocated the burden of any water shortage among the riparian owners. Under this approach, riparian owners maintain the same relationship to one another that they presently have under the common law, while protecting tribal reserved rights from state-law interference.

Either approach has enforcement difficulties. Because common-law riparianism does not depend upon an administrative structure, it is enforced **[*199]** through private lawsuits in state court. <=134> n133 Without a state administrative agency to turn to, any tribe contending that a riparian use is interfering with a paramount tribal right must, if negotiations fail, bring suit in federal or state court. <=135> n134 The expense and delay involved in pursuing

litigation could severely deplete tribal resources, perhaps forcing tribes to choose between allocating often-limited funds to litigation or foregoing a challenge to riparian uses that interfere with the tribal reserved rights.

In addition, either approach arguably involves the issue of temporal priority for paramount tribal rights. Although it appears difficult to both protect the federal-law tribal rights and avoid some temporal principle, it is not impossible. The Court itself has suggested a way to conceptualize tribal reserved water rights as an apportionment of water. <=136> n135 Viewed in that light, the question is not which user (tribe or riparian) is first in time, but how much water is apportioned to each. The tribal apportionment, however quantified, is available for tribal use. All remaining water is available for riparian use. Neither has "priority" over the other; rather, each has a right to use its portion of the water source according to the appropriate law: federal law for tribal reserved rights and state law for riparian rights.

If the difficulties in coordinating tribal and riparian rights highlight anything, it is that this is an issue that cries out for negotiated solutions. Water rights settlements, increasingly common in the western states, offer the considerable advantage of catering to the specific needs and conditions of the parties. <=137> n136 In fact, the only lawsuit filed to date to determine tribal water rights in a riparian state resulted in a settlement act. The Seminole Water Rights Compact, <=138> n137 incorporated as a matter of federal law into the Seminole **[*200]** Indian Land Claims Settlement Act of 1987, <=139> n138 represents a unique agreement tailored to the specific circumstances of the parties.

Nonetheless, the Seminole Compact may serve as a template for tribes and states elsewhere in the East. It protects the Seminole Tribe's rights by guaranteeing a perpetual right to a specified amount of water, free from state regulation. <=140> n139 At the same time the Seminole Compact does not quantify the tribal right as an absolute amount, but rather expresses the right as a percentage of the water available from specified sources. <=141> n140 To ease the administrative burdens on the state, the Tribe agreed to file an annual plan with the state water management district <=142> n141 and to comply with most of the non- procedural "terms and principles" of the state water system. <=143> n142 The Seminole Compact thus preserves the paramount nature of tribal reserved rights, but with an eye to the indeterminacy of riparian rights and the difficulties of administering a coordinated system. It may, therefore, prove a valuable model in other riparian jurisdictions.

VI. Conclusion

Although the doctrine of tribal reserved rights to water has developed within the context of western prior appropriation law, tribal water rights remain a distinct body of federal-law rights that transcend the particulars of the state-law system. The fundamental principles of those federal-law rights, designed to ensure that Indian tribes retain the benefits of their reservations and the rights they bargained for in treaties and agreements, govern tribal **[*201]** water rights nationwide, regardless of the water law system employed by the states. Tribes in eastern riparian states, no less than those in western appropriation states, hold paramount rights to water to support both the purposes for which their reservations were set aside and their reserved rights to continue aboriginal practices.

Nonetheless, the distinctions between the state law systems of prior appropriation and riparianism suggest that the tribal right to water might need to be implemented differently in eastern states. In the West, inadequate water supplies give rise to a system that prizes certainty and predictability in water rights. The definite quantification of and priority dates assigned to tribal water rights in western states allow the Indian rights to be coordinated with state-law appropriation rights in a workable integrated system. In eastern jurisdictions, however, the law of riparian rights rests on correlative rights to the use of water, a system that is inherently uncertain and relatively unpredictable. Although the

modern move to regulated riparianism introduces aspects of quantification and temporal priority, water rights even in regulated riparian states generally do not have the absolute perpetual characteristics of prior appropriation rights.

Those differences may render the details of implementing tribal water rights in western states-definite quantification and assignment of a priority date-less useful in eastern jurisdictions. Coordinating Indian reserved rights to water with riparian state-law systems may be better accomplished through some type of apportionment. Tribal water rights can be quantified, whether as a definite amount or a percentage of available water or some other approach negotiated by the tribe and the state, with the tribal "share" in the watercourse apportioned to tribal use. All water not reserved to tribal rights would be apportioned to the state-law users, to be allocated among those users as the law of the particular state provides.

Coordinating tribal reserved rights and state-law riparian rights is not without difficulty, but this article suggests ways to minimize the problems associated with integrating the two types of water rights. The approaches outlined here preserve for Indian tribes the fundamental principles of their federal-law rights, while offering feasible means of accommodating the particular needs of two disparate systems of water rights. Whether Indian tribes and eastern states adopt these strategies, or arrive at alternative negotiated agreements tailored to their specific needs, it is imperative that tribes and states in the East begin to work together to recognize tribal water rights and integrate them with state-law riparian rights into a coordinated and workable system.

FOOTNOTES:

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n2 In *Arizona v. California (Arizona I), 373 U.S. 546, 600 (1963),* decree entered, *376 U.S. 340 (1964),* the Court awarded reserved water rights to five Indian reservations, one of which (Chemehuevi) is located in the dual-system state of California and two of which (Colorado River and Fort Mohave) are located partially in California.

n3 Prior appropriation is the water law system used in Alaska and all states west of and along the 100th meridian, which runs from the Dakotas south through Texas. Robert E. Beck, Prevalence and Definition, in 2 Waters and Water Rights § 12.01 (Robert E. Beck ed., 1991). Fifteen of these states use the prior appropriation system only, while three (California, Nebraska, and Oklahoma) employ a dual system incorporating both appropriative and riparian rights. Id. (1991 & 1999 cum. supp.).

n4 See infra text accompanying notes 137 to 142 (discussing the Seminole Water Rights Compact).

n5 *207 U.S. 564 (1908).*

n6 See Michael C. Blumm, Reserved Water Rights, in 4 Waters and Water Rights § 37.01(b)(2) (Robert E. Beck ed. 1991) (citing J.L. Shurts, The Winters Doctrine: Origin and Development of the Indian Reserved Water Rights Doctrine in Its Social and Legal Context, 1880s-1930s (Ph.D. Dissertation, Univ. of Oregon, 1997) for the thesis that tribal water rights "were not a forgotten element of Western water law.").

n7 Following passage of the Reclamation Act of 1902, *43 U.S.C. § 372* et seq., federal monies poured into reclamation projects for the benefit of non-Indian lands. See Blumm, supra note 6, § 41.02 (1996) (noting that the Bureau of Reclamation "built over 600 dams with over 50,000 miles of main and lateral canals to deliver water to almost 10 million acres and over 30 million people in the western United States."). By contrast, virtually no funds were available for projects benefiting or protecting Indian lands. See National Water Commission, Water Policies for the Future: Final Report 474-75 (1973); Lloyd Burton, American Indian Water Rights and the Limits of Law 21-23 (1991).

Had the federal government made a reasonable effort to bring water to Indian lands commensurate with its efforts to reclaim non-Indian lands, tribes would have had access to "wet" water rather than paper rights decades ago.

n8 The Winters case was decided in the middle of the allotment and assimilation era of federal Indian policy, when United States law and policy were devoted to the break-up of the tribes, the imposition of private property, the assimilation of Indians into the majoritarian society, and the replacement of tribal law with federal law and administrative regulations. See generally Sidney L. Harring, Crow Dog's Case: American Indian Sovereignty, Tribal Law, and United States Law in the Nineteenth Century (1994); Judith V. Royster, The Legacy of Allotment, *27 Ariz. St. L.J. 1 (1995).* The federal government supported the Winters decision as a means of promoting the break-up of reservation lands into irrigable allotments. See Blumm, supra note 6, § 37.01(b)(2) (citing Shurts, supra note 6). Although the Indian Reorganization Act of 1934, 48 Stat. 984, codified at *25 U.S.C. §§ 461*-479, ushered in a brief era of federal encouragement of traditional tribal culture and government, by the 1940s federal Indian policy turned once again to assimilation, accomplished this time through the "termination" of the federal-tribal relationship and the imposition of state law within Indian reservations. Not until the mid- to late-1960s did the United States enter into a sustained period of promoting tribal governmental independence and control over reservation matters. The historical shifts of federal Indian policy are explored in Robert N. Clinton, et al., American Indian Law: Cases and Materials 137-164 (Michie Co., 3d ed. 1991); William C. Canby, Jr., American Indian Law in a Nutshell 10-32 (West Publishing Co., 3d ed. 1998).

n9 Indian tribes did not have the right to pursue federal question cases in federal district court on their own behalf until 1966. Pub. L. No. 89-635, § 1, 80 Stat. 880 (1966) (codified at *28 U.S.C. § 1362).*

n10 Certainty is one of the hallmarks of the western system of prior appropriation. As designed, the appropriation system rests on a rank order of priority dates and a clear quantification of the amount of water each appropriator is entitled to. See infra Part III.

n11 See Western Water Policy Review Advisory Commission, Final Report-Water in the West: Challenges for the Next Century 5-3 (1998), at http://www.den.doi.gov/ wwprac/reports/final.htm (last visited October 27, 2000). See also, e.g., *Arizona I, 373 U.S. 546, 596, 600-01 (1963)* (affirming the Special Master's decision to award five Indian tribes about one million acre feet of water based on about 135,000 irrigable acres of land); Susan Williams, Indian Winters Water Rights Administration: Averting New War, 11 Public Land L. Rev. 53, 54 (1990) (noting that the Wyoming Supreme Court affirmed an award of 189,000 acre feet to the Shoshone and Arapaho Tribes of the Wind River Reservation).

n12 See Reid Peyton Chambers and John E. Echohawk, Implementing the Winters Doctrine of Indian Reserved Rights: Producing Indian Water and Economic Development without Injuring Non-Indian Water Users?, *27 Gonz. L. Rev. 447, 448* (1991-92); Williams, supra note 12, at 53, 75, 76-77.

n13 One article has addressed issues involved in the application of reserved rights in riparian jurisdictions, but it focused primarily on federal reserved water rights for lands set aside for federal use such as national parks, national forests, and national monuments. Anita Porte Robb, Applying the Reserved Rights Doctrine in Riparian States, *14 N.C. Cent. L.J. 98 (1983).* Ms. Robb did not purport to address the special issues involved in applying the tribal reserved water rights doctrine in riparian states. Felix S. Cohen's Handbook of Federal Indian Law 576 (Rennard Strickland et al., eds., 1982) [hereinafter Cohen's Handbook]. It is certainly true that the implementation of tribal reserved rights, which to date has taken place almost exclusively in western states, can be understood only in conjunction with the prior appropriation system.

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n15 This article, as the first discussion of Indian reserved rights in riparian jurisdictions, is confined to a consideration of the rights reserved to and by the tribes themselves. Issues involved in the use of water on allotments and former allotments now in fee are left to a future exploration. Nonetheless, the same general approach that this article advocates for tribal water rights has merit as applied to allotment water rights: that is, that there are certain fundamental principles that should apply regardless of the state law system, but that the implementation details as developed within the context of prior appropriation may require some modification in the context of riparianism.

n16 *198 U.S. 371 (1905).*

n17 *207 U.S. 564 (1908).* Indian country is defined both by common law and by statute. The statutory definition is found at *18 U.S.C. § 1151:* (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and including rights-of-way running through the reservation, (b) all dependent Indian communities . . . and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of- way running through the same. The Court has concluded that the statutory categories are not to be interpreted narrowly, but rather in light of the pre- existing common law definition of Indian country as lands set aside for the use of Indians under the superintendence of the federal government. Thus, reading the statute against the backdrop of the common law, the Court held that an "informal" reservation-tribal land held in trust by the United States, but not part of a formally declared Indian reservation-was Indian country. *Oklahoma Tax Comm'n v. Sac and Fox Nation, 508 U.S. 114, 123, 128 (1993).* Because of the definition of Indian country as land under the superintendence of the United States, those tribes that are not "recognized" by the federal government do not have Indian country as a matter of federal law. Thus, state-recognized tribes such as the Mattaponi Tribe of Virginia cannot have reserved rights to water as a matter of federal law. However, where the state acts in the capacity of trustee for state-recognized tribes, in much the same manner as the federal government acts as trustee for federally recognized tribes, there is no reason that state- recognized tribes would not have reserved rights to water as a matter of state law.

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n19 Reservations may be set aside by treaty, by statute (which often served to ratify a tribal-federal agreement), or by executive order. Prior to 1871, treaties were the primary method of creating reservations. In 1871, however, Congress ended treaty-making with the Indian tribes, *25 U.S.C. § 71,* although it continued to ratify negotiated agreements. See Cohen's Handbook, supra note 14, at 127. Executive order reservations were created between 1855 and 1919. Id. at 127-28. All tribal reservations carry the same water rights regardless of how the reservation was created. See, e.g., *Arizona I, 373 U.S. 546, 598 (1963)* (executive order reservations); *Winters, 207 U.S. at 571* (reservation created by statute ratifying agreement with tribes).

n20 See *Winters, 207 U.S. at 576-77; Arizona I, 373 U.S. at 600.*

n21 See *Arizona I, 373 U.S. at 600;* see also *Winters, 207 U.S. at 577.*

n22 See *Winters, 207 U.S. at 576.*

n23 This proposition derives in part from application of the canons of construction for Indian treaties and agreements. The canons provide that treaties and agreements should be liberally construed in favor of the tribes, that ambiguities should be resolved in favor of the tribes, and that the documents should be interpreted as the Indians would have understood them. See, e.g., *Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172, 196, 200 (1999);* see generally Cohen's Handbook, supra note 14, at 222. Thus, in Winters for example, the Court found that the tribes would not have agreed to settle on a reservation too small to support their prior nomadic life while agreeing to give up the water that would render the territory remaining to them capable of supporting the tribal community. *207 U.S. at 576.*

n24 See generally Blumm, supra note 6, § 37.02(c) (1996); Judith V. Royster, A Primer on Indian Water Rights: More Questions Than Answers, *30 Tulsa L.J. 61, 71-74 (1994).*

n25 See, e.g., *Winters v. United States, 207 U.S. at 576; Arizona I, 373 U.S. at 600.*

n26 See 1 Francis Paul Prucha, The Great Father: The United States Government and the American Indians 317 (1984).

n27 *Colville Confederated Tribes v. Walton, 647 F.2d 42, 47, 49* (9th Cir.), cert. denied, *454 U.S. 1092 (1981).* Encompassed within that general purpose, the court ruled, were the primary purposes of both agriculture and fisheries preservation. *Id. at 47-48.*

n28 Charles F. Wilkinson, American Indians, Time, and the Law: Native Societies in a Modern Constitutional Democracy 16 (1987).

n29 In re General Adjudication of All Rights to Use Water in the *Big Horn River System (Big Horn I), 753 P.2d 76, 97 (Wyo. 1988),* aff'd by an equally divided Court *sub nom. Wyoming v. United States, 492 U.S. 406 (1989).*

n30 Id. at 99 (water for livestock, municipal, domestic, and commercial uses "subsumed" within the agricultural purpose). *United States v. Adair, 723 F.2d 1394, 1414 (9th Cir. 1983),* cert. denied, *467 U.S. 1252 (1984).*

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n32 Id.; see also *State ex rel. Greely v. Confederated Salish & Kootenai Tribes, 712 P.2d 754, 764 (Mont. 1985).*

n33 See *Adair, 723 F.2d at 1414.*

n34 They differ in other ways as well, including in the measure of how the water rights are quantified in appropriation states. See infra section III.B. The two types of rights also arguably differ in who reserved the water. When Indian tribes reserved the right to continue existing practices, it should be clear that the tribes themselves impliedly reserved the water as well. See *United States v. Winans, 198 U.S. 371, 381 (1905)* (holding that treaties are "not a grant of rights to the Indians, but a grant of rights from them-a reservation of those not granted."). It is not clear, however, whether the tribes or the United States (or both, as mutual parties to the agreements) reserved the water at the time the Indian reservations were set aside. There is language in the 1908 Winters decision supporting both views. See *207 U.S. 564, 576-77.* Most modern courts appear to believe that the rights were reserved for the Indians by the federal government. See *Arizona I, 373 U.S. at 600* (stating that the U.S. "did reserve the water rights for the Indians" when the reservations were created). Resolution of the issue may ultimately be irrelevant because the water rights are either federally created or federally protected and guaranteed. In either case, tribal reserved rights to water are questions of federal law. See *Arizona v. San Carlos Apache Tribe of Arizona, 463 U.S. 545, 671 (1983)* (noting that both state and federal courts "have a solemn obligation to follow federal law" in adjudicating tribal water rights).

n35 See *Winters v. United States, 207 U.S. at 576.*

n36 See *United States v. Adair, 723 F.2d 1394, 1414 (9th Cir. 1983).*

n37 Id. ("Such water rights necessarily carry a priority date of time immemorial. The rights were not created by the 1864 Treaty, rather, the treaty confirmed the continued existence of these rights.").

n38 *207 U.S. 564 (1908).*

n39 See *id. at 576.*

n40 *198 U.S. 371 (1905).*

n41 See *id. at 381.* Winans was not a water rights case, but an interpretation of the treaty right to fish at off-reservation locations "in common with" non-Indians. Id. Non- Indian property owners claimed that the Indians had no right to trespass on private property to reach and use their fishing locations, but the Court held that the reserved right to continue the aboriginal practice of fishing "imposed a servitude upon every piece of land" subject to the tribal rights. Id. Although the servitude was implied from the express reservation of the fishing right, the Court determined that the implied right was necessary "to give effect to the treaty." Id.

n42 Blumm, supra note 6, § 37.02(a)(2). Although I have questioned this position in the past, see Royster, supra note 24, at 63 n.5, I am increasingly persuaded of its value.

n43 *723 F.2d at 1413-14* (relying on Winans to find that the Klamath treaty of 1864 recognized the tribe's "aboriginal water rights").

n44 See *Colville Confederated Tribes v. Walton, 647 F.2d 42, 47-49 (9th Cir. 1981),* cert. denied, *454 U.S. 1092 (1981)* (discussing the continuation of aboriginal practices as one of several reasons for the creation of reservations). See also *In re Determination of the Rights to the Use of the Surface Waters of the Yakima River Drainage Basin, 850*

P.2d 1306, 1316-17 (Wash. 1993) (en banc) (noting that water for fishing rights would be reserved "if fishing was a primary purpose of the reservation").

n45 In Adair, the federal court ruled that the Klamath Tribe held reserved water rights to support its treaty reserved right to fish, even though the land-reservation on which those rights had existed had been terminated. *723 F.2d at 1411-14.* The court thus necessarily determined that the tribe's aboriginal-practices water right existed independently of any land reservation and that those water rights continued even though they were now off-reservation rights.

n46 *764 P.2d 78 (Idaho 1988).* Despite the federal nature of tribal reserved rights to water, those rights may be adjudicated in state court as part of a general stream adjudication to determine all rights in a given stream system. Congress authorized the joinder of the federal government in the McCarran Amendment of 1952, *43 U.S.C. § 666,* and the Supreme Court subsequently interpreted the legislation to permit state adjudication of tribal reserved rights to water. See *Colo. River Water Conservation Dist. v. United States, 424 U.S. 800 (1976).* Although the McCarran Amendment does not waive tribal sovereign immunity and thus tribes cannot be made parties to state general stream adjudication without their consent, the federal government, as trustee for tribal property rights, can be joined to represent tribal interests. See *Arizona v. San Carlos Apache Tribe, 463 U.S. 545, 566 n.17 (1983)* (stating that "the McCarran Amendment did not waive the sovereign immunity of Indians as parties to state comprehensive water adjudications," but that "any judgment against the United States, as trustee for the Indians, would ordinarily be binding on the Indians."). State courts adjudicating tribal reserved rights are obligated to apply federal law to the determination of those rights, see *id. at 571,* although some state court judges have declared their belief that state law should govern the exercise of tribal reserved rights. See, e.g., In re General Adjudication of All Rights to Use Water in the *Big Horn River System, 835 P.2d 273, 278 (Wyo. 1992)* (holding that tribes must comply with state law to change the use of their reserved water rights), 284 (Thomas, J., concurring) (stating that tribal water rights should be administered by the State Engineer).

n47 In re SRBA, No. 39576, Subcase No. 03-10022 (Idaho Dist. Ct., Nov. 10, 1999).

n48 See generally Michael C. Blumm, et al., Judicial Termination of Treaty Water Rights: The Snake River Case, *36 Idaho L. Rev. 449 (2000)* (providing a fuller explanation of this and other criticisms of the SRBA court's decision). The Tribe asked that the judgment be vacated and the issues determined in federal court on the ground that the SRBA judge failed to disclose, and the Tribe did not discover until after the judgment issued, that the judge and his family have direct interests in the SRBA litigation that are adverse to the interests of the Nez Perce. The judge, however, refused to vacate his decision on the ground that his and his family's claims were too "inconsequential" to support any finding of a conflict of interest sufficient for disqualification. In re SRBA, No. 39576, Subcase No. 03-10022 at 37 (Mar. 23, 2000). See, e.g., *Winters v. United States, 207 U.S. at 576-77.*

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n50 See *Arizona I, 373 U.S. 546, 597-98 (1963);* see also *Cappaert v. United States, 426 U.S. 128, 138 (1976).* See generally Amy K. Kelley, Constitutional Foundations of Federal Water Law, in 4 Waters and Water Rights § 35.02-.03 (Robert E. Beck ed., 1991).

n51 U.S. Const. art. I, § 8, cl. 3 ("The Congress shall have Power . . . to regulate Commerce . . . among the several States . . . .").

n52 See, e.g., *Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824);* see generally Kelley, supra note 50, § 35.02.

n53 In federal territories, the federal government holds the lands submerged beneath navigable waters in trust for future states. See *Shively v. Bowlby, 152 U.S. 1, 57 (1894).* Once states are admitted to the Union, the "equal footing" doctrine generally provides that ownership of the bedlands passes to the state, see *Montana v. United States, 450 U.S. 544, 551 (1981),* although, as noted, the federal government retains its constitutional powers over those waters, *Arizona I, 373 U.S. at 597-98.* Indian tribes have frequently asserted title to bedlands in Indian country pursuant to their treaties, although tribal success in bedlands claims has been mixed. Compare *Choctaw Nation v. Oklahoma, 397 U.S. 620 (1970)* (holding the Choctaw Nation owns the bed of the Arkansas River pursuant to treaty) with *Montana, 450 U.S. at 553-57* (holding the Crow treaties did not overcome the presumption in favor of state bedlands ownership).

n54 U.S. Const. art. I, § 8, cl. 3 ("The Congress shall have Power . . . to regulate Commerce . . . with the Indian tribes . . . . "). In one of the foundation cases of federal Indian law, Chief Justice John Marshall declared that relations between the Indian nations and the United States vested in the federal government, not the states. *Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 561 (1832).* The exclusive federal power recognized in Worcester was subsequently expanded into "plenary" power over the Indian tribes themselves. See generally Nell Jessup Newton, Federal Power Over Indians: Its Sources, Scope, and Limitations, *132 U. Pa. L. Rev. 195 (1984).* Although the Supreme Court initially rejected the Indian commerce clause as the source of congressional authority to legislate for Indian tribes, see *United States v. Kagama, 118 U.S. 375, 378-79 (1886),* by the late twentieth century the Court grounded federal power over tribes firmly in that clause. See, e.g., *McClanahan v. Ariz. State Tax Comm'n, 411 U.S. 164, 172 n.7 (1973)* (citing the Indian commerce clause as the source of federal power over "Indian matters").

n55 See *Worcester, 31 U.S. (6 Pet.) at 561* (state law "can have no force" in Indian country unless "in conformity with treaties, and with the acts of congress"); *California v. Cabazon Band of Mission Indians, 480 U.S. 202, 207 (1987)* ("[S]tate laws may be applied to tribal Indians on their reservations if Congress has expressly so provided."). The "exceptional circumstances" exception to the lack of state power arises from the Court's grant of authority to states to regulate Indian treaty fishing rights for the limited purpose of preserving the species. See *Puyallup Tribe, Inc. v. Washington Game Dep't, 433 U.S. 165, 176-77 (1977).* But see *New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 331-32 & n.15 (1983).* To date, that is the only circumstance in which the Court has permitted states to regulate Indians and Indian property rights within Indian country without express congressional authorization.

n56 Professor Joseph Dellapenna argues that no tribal reserved rights to water can exist in the original thirteen states because those states never contained federal public lands. See Joseph W. Dellapenna, Regulated Riparianism, in 1 Waters and Water Rights § 9.06(b)(2) (Robert E. Beck ed., 1991). But the authority to reserve water, or protect tribal reserved water rights, does not depend upon the public status of the lands prior to their reservation. See Blumm, supra note 6, § 37.01(c)(2) ("Reserved water rights are the product of a preemptive federal intent to use water for federal purposes, not a consequence of federal ownership of water as proprietor of the public domain."). Although no federal public lands may have existed in the original states, Indian country most certainly did (and does). The foundation cases of federal Indian law, for example, established the "domestic dependent sovereign" status of the *Cherokee Nation, Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 17 (1831),* in which the laws of Georgia (an original state) "can have no force." *Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 561 (1832).* Numerous federally recognized Indian tribes continue today to govern their Indian country in the original thirteen states. See *65 Fed. Reg. 13,298* (Mar. 13, 2000) (listing federally recognized Indian tribes, including, inter alia, the Cayuga, Oneida, and Seneca Nations of New York). It is the creation and existence of this Indian country that gives rise to new-use reserved water rights and confirms aboriginal-practice reserved water rights.

n57 Wilkinson, supra note 28, at 16.

n58 See, e.g., *Alaska v. Native Village of Venetie Tribal Government, 522 U.S. 520, 530-31 (1998)* (holding that creation of Indian country requires land to be set aside by Congress under federal superintendence); *South Dakota v. Yankton Sioux Tribe, 522 U.S. 329, 330 (1998)* (asserting that reservation diminishment is a matter of congressional intent). From 1855, when the practice began, to 1919, Indian country could be created and terminated by executive order. See Cohen's Handbook, supra note 14, at 493. Although congressional acquiescence supported the presidential practice, Congress declared in 1919 that thereafter only it could establish Indian country. Act of June 30, 1919, ch. 4, § 27, 41 Stat. 34 (codified at *43 U.S.C. § 150).*

n59 In some cases, the rights were reserved until the occurrence of a specified event. For example, several of the Chippewa bands of the western Great Lakes reserved hunting, fishing, and gathering rights "during the pleasure of the President." See *Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172, 177 (1999)* (quoting 1837 Treaty with the Chippewa, 7 Stat. 537). Although that treaty language gives the President of the United States the authority to terminate the usufructuary rights, the rights survive until such time as the President may act. See *id. at 194-95.*

n60 See *Lone Wolf v. Hitchcock, 187 U.S. 553, 566 (1903)* (discussing Congress' "power to abrogate" treaties with the Indian tribes).

n61 See, e.g., *Yankton Sioux Tribe, 522 U.S. at 330* (stating congressional intent for reservation diminishment "must be 'clear and plain'") (quoting *United States v. Dion, 476 U.S. 734, 738-39 (1986)); Mille Lacs, 526 U.S. at 202* ("A

congressional determination to terminate [a treaty with the Indians] must be expressed on the face of the Act or be clear from the surrounding circumstances . . . ."); *United States v. Dion, 476 U.S. 734, 739-40 (1986)* ("clear and plain" intention from Congress is required "to abrogate Indian treaty rights."); *Washington v. Wash. State Com. Passenger Fishing Vessel Ass'n, 443 U.S. 658, 690 (1979)* (requiring "explicit statutory language" for "abrogation of [Indian] treaty rights."); *Mattz v. Arnett, 412 U.S. 481, 505 (1973)* (declining to infer an intent to terminate a reservation in the absence of clear statutory language); *Menominee Tribe v. United States, 391 U.S. 404, 413 (1968)* (holding that a treaty with the Menominee Tribe was not abrogated because there was no "explicit statement" from Congress).

n62 At the same time, reserved water rights cannot interfere with prior state-law water rights. The water available for reserved rights does not include that water which is already in use pursuant to state law at the time the reserved rights came into existence. See Blumm, supra note 6, § 37.02(d); Royster, supra note 24, at 67. For time-immemorial rights, of course, by definition, no other rights existed prior to them. For water rights that came into existence when a land reservation was created, however, there may be some state-law water rights that pre-date its creation; those state-law rights would be protected against interference by the exercise of tribal reserved rights to water. This principle is implicit in the Court's decision in *Winters, 207 U.S. 564.* Although the federal government did not begin an irrigation project for reservation lands until a decade after the reservation was established, *id. at 566*, the time at which actual use of the water began was considered irrelevant. The tribal reserved right comes into existence at the creation of the reservation or at time-immemorial, depending upon the type of water right reserved, and the right continues unless and until it is terminated by Congress.

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n64 See supra note 8 and accompanying text.

n65 See supra note 6-8 and accompanying text. *Colo. River Water Conservation Dist. v. United States, 424 U.S. 800, 805 (1976).* There is some variation in specific detail among the various western states, but the Court's statement captures the basic doctrine.

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n67 See Beck, supra note 3, § 12.02.

n68 Id.

n69 See infra text accompanying notes 70-77. See generally Beck, supra note 3, § 12.03; Tarlock, supra note 1, at § 5:30.

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n71 See, e.g., *Winters v. United States, 207 U.S. 564, 577 (1908)* (using the date the reservation was created, where the Court found the water was reserved to fulfill the purposes of the reservation); *Arizona I, 373 U.S. 546, 600 (1963)* (finding Indian water rights created on the date the reservation was created). Tribal water rights will generally pre-date most non-Indian appropriations because most tribal reservations were established before significant non-Indian appropriations were perfected. In one case, in fact, a state court refused to determine whether a tribe had a time-immemorial priority date, on the ground that even a priority date of creation of the reservation would accord the tribe the senior water right in the area. See *New Mexico ex rel. Martinez v. Lewis, 861 P.2d 235, 238 (N.M. App. 1993),* cert. denied, *858 P.2d 85 (N.M. 1993).*

n72 See e.g., *United States v. Adair, 723 F.2d 1394, 1414 (9th Cir. 1983),* cert. denied, *467 U.S. 1252 (1984)* (holding that a tribe's aboriginal water rights "necessarily carry a priority date of time immemorial"); *State ex rel. Greely v. Confederated Salish & Kootenai Tribes, 712 P.2d 754, 764 (Mont. 1985)* (asserting that a priority date of time immemorial applies where the Indians' use of the water "existed before creation of the reservation."). The Supreme Court adopted the PIA standard based on the recommendation of a special master. See *Arizona I, 373 U.S. at 600-01.*

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n74 See In re General Adjudication of All Rights to Use Water in the *Big Horn River System, 753 P.2d 76, 101-05 (Wyo. 1988),* aff'd by an equally divided Court *sub nom. Wyoming v. United States, 492 U.S. 406 (1989).*

n75 See *Gila River Pima-Maricopa Indian Community v. United States, 695 F.2d 559, 561 (Fed. Cir. 1982); Gila River Pima-Maricopa Indian Community v. United States, 684 F.2d 852, 864-65 (Ct. Cl. 1982).*

n76 See *Colville Confederated Tribes v. Walton (Walton I), 647 F.2d 42, 48 (9th Cir. 1981),* cert. denied, *454 U.S. 1092 (1981).*

n77 See *Colville Confederated Tribes v. Walton (Walton II), 752 F.2d 397, 405 (9th Cir. 1985),* cert. denied, *475 U.S. 1010 (1986)* (upholding an instream flow right of 350 acre feet per year); United States v. Anderson, 6 Indian L. Rep. F-129, F- 130 (E.D. Wash. 1979) (finding that maintenance of trout fishery is related to maximum temperature as well as minimum flow). A number of states with both humid and arid climates developed dual systems of riparian and appropriation rights. Most of these states-located on the west coast and along the line from the Dakotas south to Texas-eventually moved to pure appropriative rights. See generally Dellapenna, supra note 56, § 8 (discussing appropriative rights and dual systems). A few, however, retain a dual approach. Id. § 8.02. For an analysis of tribal water rights in dual-system states, and particularly the unique circumstances posed by the status of the Five Civilized Tribes in Oklahoma, see Taiawagi Helton, Comment, Indian Reserved Water Rights in the Dual-System State of Oklahoma, *33 Tulsa L.J. 979 (1998).*

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n79 The natural flow theory of riparian rights-that riparian owners were entitled to the natural flow of the stream undiluted in quantity or quality-has been replaced in virtually all instances by the reasonable use theory. See Tarlock, supra note 1, § 3:12 (asserting that reasonable use is now the standard in most states, and discussing case law that attempts to define "reasonable"). Because natural flow has essentially been abandoned in riparian state law, see id., this article will not address it.

n80 At common law, riparian rights attach only to riparian land, and a riparian owner is anyone who owns land abutting a watercourse. See generally Tarlock, supra note 1, § 3:8 (defining a riparian right). Prior appropriation rights, by contrast, do not depend upon ownership of land riparian to a water source. See id. § 5.1 (discussing prior appropriation rights as "a theory of water rights separate from land ownership") Similarly, the Regulated Riparian Model Water Code eliminates the common-law requirement of riparian ownership. The Regulated Riparian Model Water Code § 2R-1-02 (American Society of Civil Engineers, Water Laws Committee, Joseph W. Dellapenna, ed., 1997) [hereinafter Model Code].

n81 See *Harris v. Brooks, 283 S.W.2d 129, 134 (Ark. 1955)* (holding that when one lawful use of water interferes with another, the court must determine whether the interfering use is unreasonable). See generally Tarlock, supra note 1, § 3:12 (discussing riparian rights of surface waters); see also Dellapenna, supra note 56, § 7.02(d) (discussing basic concepts of reasonable use theory of riparian water rights).

n82 See Dellapenna, supra note 56, § 9.03. See Dellapenna, supra note 56, § 7.03(d) ("[T]emporal priority is at best only marginally relevant . . . .").

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n84 See Tarlock, supra note 1, § 3:12 (asserting most states allow changes in water use under the reasonable use standard).

n85 Professor Dan Tarlock asserts that in cases of conflicting riparian rights, courts often take account of which use began first. Tarlock, supra note 1, § 3:11. Similarly, the *Restatement (Second) of Torts § 850A(h)* (1977) considers first use controlling in determining the comparative "reasonableness" of two or more competing uses. Professor Joseph W. Dellapenna, on the other hand, contends that in practice, first-in-time has essentially no impact on judicial decisions. See Dellapenna, supra note 56, § 7.03(d).

n86 See Dellapenna, supra note 56, § 7.01 ("The basic concept of riparian rights is that an owner of land abutting a waterbody has the right to have the water continue to flow across or stand upon the land, subject to the equal rights of each owner.").

n87 See id. at § 7.02(d) ("The only real restriction on use by any one riparian, then, is that a use cannot inflict a 'substantial harm' . . . on any other riparian user." (citing as one example *Dumont v. Kellogg, 29 Mich. 420 (1874))).*

n88 See, e.g., *Harris, 283 S.W.2d at 134:* When one lawful use of water interferes with or detracts from another lawful use, then a question arises as to whether, under all the facts and circumstances of that particular case, the interfering use shall be declared unreasonable and as such enjoined, or whether a reasonable and equitable adjustment should be made, having due regard to the reasonable rights of each.

n89 See generally Beck, supra note 3, § 14 (discussing in detail the permit and regulatory process). The exception is Colorado, which administers state water rights through a system of specialized water courts. See id. at § 14.04.

n90 See id. at § 14.03 (discussing the different methods of registration and noting most state registration procedures involve filing an application).

n91 But see Dellapenna, supra note 56, at § 9.03 (discussing the recent rise of regulation and administrative oversight of riparian rights in eastern states).

n92 See id. at § 7.03 (discussing the resolution of conflicts among riparian users).

n93 See id. See id. at § 9.01.

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n95 See generally Model Code, supra note 80. For an analysis of the Model Code, see generally Robert E. Beck, *25 Wm. & Mary Envtl L. & Pol'y Rev. 113 (2000).*

n96 See Dellapenna, supra note 56, § 9.03 (describing the general process of obtaining a permit); Model Code, supra note 95, §§ 6R-1-01, 6R-1-04.

n97 See Dellapenna, supra note 56, § 9.03(a); see also Model Code, supra note 95, §§ 6R-2-01, 7R-1-01 (listing requirements of a permit application and permit terms and conditions, respectively).

n98 See Dellapenna, supra note 56, § 9.03(b) ("[M]ost regulated riparian statutes provide as a sole standard a command that the use be reasonable."); Model Code, supra note 95, § 6R-3-01(1)(a).

n99 See Dellapenna, supra note 56, § 9.03(a)(4) (asserting most states have "opted for the concept of periodically renewable water permits."); Model Code, supra note 95, § 7R-1-02(1) (providing for "a period of time representing the economic life of any necessary investments not to exceed 20 years," although it allows permits "not to exceed 50 years" for governmental and public bodies as reasonable to retire debt accrued for the construction of related facilities). Nonetheless, five regulated riparian states apparently issue permits in perpetuity. See Dellapenna, supra note 56, § 9.03(a)(4) n.396 (referencing Delaware, Indiana, Kentucky, New York, and Virginia).

n100 See Model Code, supra note 95, § 7R-1-01(b) (codifying that the permit shall contain "the authorized amount of the withdrawal and the level of consumptive use, if any."); Dellapenna, supra note 56, § 9.03(a)(5)(A) n.447 (listing nine states that include the quantity of water consumed or diverted as a condition of the permit, and three others that require quantity information in the permit application).

n101 The grandfathering in of existing uses is often a feature of existing regulated riparian systems. See Dellapenna, supra note 56, § 9.03(a)(3). The Model Code requires existing riparian users to apply for a permit within one year, Model Code, supra note 95, § 6R-1003(1), unless the existing use is an exempt use. Exempted uses are so-called small withdrawals, those less than 100,000 gallons per day. Id. § 6R-1-02(1). The state agency may nonetheless require registration of exempt uses. Id. § 6R-1-06.

n102 Model Code, supra note 95, § 6R-3-01(1)(a)- (b). Safe yield is defined as "the amount of water available for withdrawal without impairing the long-term social utility of the water source, including the maintenance of the protected biological, chemical, and physical integrity of the source." Id. § 2R-2-21(1). In addition, the agency is to determine the reasonableness of the proposed use, and the definition of "reasonable" includes consideration of other uses of the watercourse and "the probable severity and duration of any injury" foreseeable to other uses. Id. at § 6R-3-02. See also Dellapenna, supra note 56, § 9.03(b)(1) (noting that most of the existing riparian regulatory schemes adopt the reasonableness standard either expressly or implicitly and that probable injury to other users is a permit criterion in several of the regulated riparian states).

n103 See Model Code, supra note 95, § 6R-3-02 commentary. See also id. § 6R-2-03 (providing that subject to certain exceptions such as routine applications, public health and welfare, and joint consideration of pending applications for withdrawals from the same source, permit applications are to be processed in the order they are received).

n104 Model Code, supra note 95, §§ 7R-1-01(j), 7R-1-02(1); Dellapenna, supra note 56, § 9.03(a)(4) (explaining that most states set a time limit through the use of permits). A few states, however, apparently grant regulated riparian permits in perpetuity. See id. at n.396.

n105 See Model Code, supra note 95, § 6R-3-04(4); see also id. § 7R-1-02(2). In evaluating whether the public interest is equally served by both the renewal use and the new proposed use, the agency is to "giv[e] consideration" to the investment in facilities made by the existing permit holder. Id. at § 6R-3-04(4).

n106 Model Code, supra note 95, § 7R-3-01; see also Dellapenna, supra note 56, § 9.03(d). The Model Code determines preferences among water rights in cases of insufficient water to grant all permits on a watercourse. Model Code, supra, § 6R-3-04. As with common-law riparianism, domestic use has the top priority. *Id. See supra* note 95, sections II.A-B.

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n108 See *Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172, 177 (1999)* (referencing the 1837 Treaty with the Chippewa, 7 Stat. 537, and the 1842 Treaty with the Chippewa, 7 Stat. 591).

n109 See *Washington v. Wash. State Com. Passenger Fishing Vessel Ass'n, 443 U.S. 658, 662 & n.2 (1979)* (gathering treaties with tribes in what is now Washington State that contain the tribal reservation of the "right of taking fish"). Justice Thomas argued recently that the Court should distinguish between reserved rights, such as the "right of taking fish" found in most Pacific Northwest treaties, and reserved privileges, such as the "privilege of hunting, fishing, and gathering the wild rice" found in the Chippewa treaties. *Mille Lacs, 526 U.S. at 226* (citing 1837 Treaty with the Chippewa, 17 Stat. 537). The Court, however, rejected that notion and refused to adopt the proposed distinction on the grounds that the Chippewa would not have understood any such fine legal distinction in the treaty language and that the distinction would make the treaty "essentially an empty promise because it gave the Chippewa nothing that they did not already have." *Id. at 205-06.*

n110 See Treaty with the Chippewa of Saginaw, Swan Creek, and Black River, 1864, Arts. 4-5, 14 Stat. 637, reprinted in II Charles J. Kappler, Indian Affairs: Laws and Treaties 868, 870-71 (1904).

n111 See *In re Big Horn I, 753 P.2d 76, 95-97 (Wyo. 1988),* aff'd by an equally divided Court *sub nom. Wyoming v. United States, 492 U.S. 406 (1989)* (finding the primary purpose of the Wind River Reservation to be agriculture, based on the extensive agricultural provisions of the 1868 Treaty with the Shoshones and Bannacks).

n112 See, e.g., the Treaty of Wolf River setting aside a reservation for the Menominee Tribe, Treaty with the Menominee, May 12, 1854, 10 Stat. 1064, 1065 ("[T]he United States agree to give [the lands specified] . . . to said Indians for a home."); *Colville Confederated Tribes v. Walton, 647 F.2d 42, 47 (9th Cir. 1981),* cert. denied, *454 U.S. 1092 (1981)* (noting that the "general purpose" of an Indian reservation is "to provide a home for the Indians.").

n113 See Dellapenna, supra note 56, § 9.06(b)(2).

n114 Id.

n115 In fact, tribal reserved water rights differ in material ways from state-law appropriation rights. For example, tribal rights arise from the reservation of land or the preservation of aboriginal uses. Prior appropriation rights, on the other hand, do not vest until the appropriator diverts the water and puts it to an actual beneficial use. See *Colo. River Water Conservation Dist. v. United States, 424 U.S. 800, 805 (1976).* In addition, tribal rights cannot be lost through non- use, but appropriative rights can be abandoned or forfeited if the appropriator does not maintain continued beneficial use of the water. See id.

n116 See, e.g., *Winters, 207 U.S. 564 (1908); Arizona I, 373 U.S. 546, 595-601 (1963).*

n117 Absent acts of Congress or treaties applicable to specific tribes, the Court has never distinguished among Indian tribes in the application of principles of federal Indian law. Moreover, as Professor Michael Blumm notes, subjecting tribal rights to pro rata reductions in times of water shortages, a feature of riparianism, "could impermissibly defeat the federal purpose of the reservation." Blumm, supra note 6, § 37.01(c)(2).

n118 See *Arizona v. San Carlos Apache Tribe, 463 U.S. 545, 571 (1983)* (imposing on state and federal courts adjudicating tribal water rights "a solemn obligation to follow federal law."). See also *United States v. Adair, 723 F.2d 1394, 1411 n.19 (9th Cir. 1983),* cert. denied, *467 U.S. 1252 (1984)* ("The fact that water rights of the type reserved for the Klamath Tribe are not generally recognized under state prior appropriations law is not controlling as federal law provides an unequivocal source of such rights."); *State ex rel. Greely v. Confederated Salish & Kootenai Tribes, 712 P.2d 754, 765-66 (Mont. 1985)* ("state courts are required to follow federal law with regard to [tribal] water rights.").

n119 This is not to deny that Indian tribes, as property owners, may be able to assert riparian rights to fulfill needs for water over and above their reserved rights. In the context of federal reserved water rights for reservations other than those for Indians (e.g., national parks and national forests), the Supreme Court has distinguished between the primary and the secondary purposes of the federal reservation. See *United States v. New Mexico, 438 U.S. 696, 700 (1978)* (determining federal reserved water rights for the Gila National Forest). The Court held that water is impliedly reserved for the primary purposes of these federal reservations, but that water for secondary purposes must be obtained pursuant to state law. See *id. at 702.* Subsequently, the California Supreme Court recognized the federal government's right to riparian water rights to fulfill the secondary purposes of federal reservations. See *In re Water of Hallett Creek Stream System, 749 P.2d 324 (Cal. 1988),* cert. denied, *488 U.S. 824 (1988).* In New Mexico, the Court held that the primary purposes of national forests, for which water rights are reserved implicitly as a matter of federal law, were timber management and conservation of water flows only. *438 U.S. at 707-08.* In Hallett Creek, the federal government sought recognition of riparian water rights for the secondary purpose of wildlife enhancement within a national forest. The California Supreme Court held that as the proprietor of the lands, the United States retained its riparian rights for such purposes. See *749 P.2d at 329-30, 335-36.* Similarly, the federal government's right to seek prior appropriation water rights has been recognized in Nevada. See *Nevada v. Morros, 766 P.2d 263 (Nev. 1988)* (providing an appropriative right to the Bureau of Land Management for stock and wildlife watering purposes). For a fuller analysis of the Hallett Creek and Morros decisions, see Amy K. Kelley, Federal- State Relations in Water, 4 Waters and Water Rights § 36.04(a) (Robert E. Beck ed., 1991). The Supreme Court has not applied the New Mexico primary- versus-secondary-purpose principle to Indian reservations, and its relevance to tribal water rights is in question. See Cohen's Handbook, supra note 14, at 583-84. Moreover, the state and lower federal courts have taken varied approaches to its application. For example, the Ninth Circuit determined that the "general purpose" of the Colville Reservation was a homeland for the tribes, encompassing primary purposes of both agriculture and fisheries preservation. See *Colville Confederated Tribes v. Walton, 647 F.2d 42, 47-48 (9th Cir. 1981),* cert. denied, *454 U.S. 1092 (1981).* The Wyoming Supreme Court, by contrast, held that the sole "primary purpose" of the Wind River Reservation was agriculture. See *In re Big Horn I, 753 P.2d 76, 97 (Wyo. 1988),* aff'd by an equally divided Court *sub nom. Wyoming v. United States, 492 U.S. 406 (1989).* Nonetheless, the California court's ruling in Hallett Creek should be applicable to Indian reservations, and tribes should be entitled to seek state-law riparian (or in the west, appropriation) rights for water for reservation purposes beyond those for which the reservation was created. See Royster, supra note 24, at 103. Thus, for example, the Wind River Tribes should be able to seek state-law prior appropriation rights for water for "industrial" purposes, which the state court expressly rejected as a purpose for which the reservation had been established. See *Big Horn, 753 P.2d at 98.*

n120 See *United States v. Winans, 198 U.S. 371 (1905); Washington v. Wash. State Com. Passenger Fishing Vessel Ass'n, 443 U.S. 658 (1979); Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172, 205-206 (1999).* The issue arose with respect to the language in treaties with the tribes of the Pacific Northwest reserving the right to fish "in common with" non-Indians at the tribes' usual fishing places, including those places located outside reservation borders. See *Fishing Vessel, 443 U.S. at 662 n.2.* In Winans, the Winans brothers owned land surrounding a traditional Yakama fishing place on the *Columbia River. See 198 U.S. at 371-72.* The Winans argued that because their property ownership barred access to non-Indians under state trespass law, and because tribal rights were held "in common with" non-Indians, tribal members should also be subject to state trespass restrictions. *Id. at 376.* The Court, however, held that although the fishing right was in common, "the Indians were secured in its enjoyment by a special provision of means for its exercise." *Id. at 381.* Their right of taking fish, the Court determined, necessarily included the right to cross private land to reach their fishing places and the right to occupy it for the purposes of the treaty right. "No other conclusion would give effect to the treaty." Id. In Fishing Vessel, 74 years after Winans, the State of Washington reiterated the Winans' argument, with the same result. The State argued that the treaty provision reserved only access to the fishing places and an "equal opportunity" with non-Indians once there to attempt to catch fish. *443 U.S. at 675-76.* The Court again rejected the contention that the treaty provisions guaranteed to the tribes only the rights the tribes would have had without the treaties, holding that the tribes reserved a right to take a share of the fish. See *id. at 679.* The Court reasoned that the tribes bargained for the provisions in order to continue their aboriginal fishing practices, and "they would be unlikely to perceive a 'reservation' of that right as merely the chance, shared with millions of other citizens, occasionally to dip their nets into the territorial waters." Id. Moreover, the Court drew an express analogy to reserved water rights. After discussing a half-dozen of its prior cases that rejected the "equal opportunity" with non-Indians view of treaty reservations, the Court noted that "[a] like interpretation . . . has been followed by the Court with respect to . . . water rights that were merely implicitly secured to the Indians by treaties reserving land-treaties that the Court enforced by ordering an apportionment to the Indians of enough water to meet their subsistence and cultivation needs." *Id. at 684* (citations omitted). This analogy helps clarify that the Court, in fashioning the tribal reserved water rights doctrine, did not intend tribal water rights to be determined by state law principles.

n121 As Professor Dellapenna notes, Montana at the time of the 1908 Winters decision was thought to be a riparian jurisdiction. See Dellapenna, supra note 56, § 9.06(b)(2). On that basis, the doctrine of tribal reserved rights to water was first announced within the context of riparianism, and only subsequently developed the specific details necessary to coordinate those reserved rights with state-law appropriative rights. See supra Part III. Read against a riparian backdrop, Winters stands for the proposition that in times of water shortage, Indian tribes do not share in any pro rata reduction of water. Rather, tribal reserved rights are protected as a matter of federal law against the subsequent exercise of riparian rights.

n122 Professor Dellapenna uses Kansas City as a useful shorthand for the dividing line between eastern riparian jurisdictions and western appropriation states. See Dellapenna, supra note 56, § 6.01. *Arizona I, 373 U.S. 546, 600-01 (1963).*

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n124 One exception was the quantification of a fisheries right as that amount of water necessary to keep the stream at 68 degrees or less, with a minimum flow of 20 cubic feet per second. See United States v. Anderson, 6 Indian L. Rep. F-129, F-130 (E.D. Wash. 1979).

n125 The Seminole Compact is discussed infra at text accompanying notes 137-142.

n126 See supra section IV(B).

n127 See supra notes 102-103 and accompanying text.

n128 As noted earlier, however, any riparian use that began prior to the existence of the tribal reserved right would be paramount to the tribal right.

n129 See Dellapenna, supra note 56, §§ 7.02(d)(2)-(3).

n130 Professor Dellapenna worries that this would create a problem of circular priorities: riparian A can show priority over tribe B which has priority over riparian C, but a court concludes that C's use is more reasonable than A's. See Dellapenna, supra note 56, § 9.06(b)(2). He then asserts that the court could protect C's use only to the extent of A's quantity. It is true that if there is insufficient water for both B and C, the tribal right is paramount over C. But the paramount nature of the tribe's right does not affect the relations between A and C as a matter of state riparian law. If A's use is determined to be a permissible reasonable use under the state's law, then it is protected against interference from the exercise of the tribal right. If A's use is determined not to be a permissible reasonable use in light of C's more reasonable use, then state law will enjoin A and A will cease to the use the water. Nothing in that injunction, however, alters the relations between riparian A and tribe B: if A is using a water right that was in existence prior to the existence of the tribal right, the tribe cannot interfere with it. Similarly, if C's use is held more reasonable by the state court, then C is manifestly entitled to use the water as a matter of state law. But C's use cannot interfere with the paramount federal-law rights of the tribe. Regardless of whether C's use replaces A's as the more reasonable or supplements A's on the ground that both together are reasonable, C's use is subject to the tribal reserved rights. There is thus no circle of priorities to cause concern. C's rights with respect to the federal-law tribal rights do not change regardless of whether or not A's use is allowed to continue as a matter of state law.

n131 See Blumm, supra note 6, § 37.01(c)(2) (referencing Eva Hanna Hanks, Peace West of the 98th Meridian-Solution to Federal-State Conflicts over Western Waters, *23 Rutgers L. Rev. 33, 39-40 n.25 (1968)).*

n132 See id.

n133 Riparian rights are thus more in the nature of tort actions than property rights. See Dellapenna, The Right to Consume Water Under "Pure" Riparian Rights, 1 Waters and Water Rights § 7.02(d)(1) (Robert E. Beck ed., 1991).

n134 Given the mixed reception of tribal claims to reserved water rights in western state courts, most tribes would likely choose to file suit in federal district court.

n135 See *Fishing Vessel, 443 U.S. at 684* ("an apportionment to the Indians of enough water to meet their subsistence and cultivation needs.").

n136 See generally Blumm, supra note 6, § 37.04(c)(1) (1999); Jon C. Hare, Indian Water Rights: An Analysis of Current and Pending Indian Water Rights Settlements (1996); Peter W. Sly, Reserved Water Rights Settlement Manual (1988); Indian Water in the New West (Thomas R. McGuire, et al., 1993).

n137 *25 U.S.C. § 1772e.* The Compact is reprinted in Seminole Indian Land Claims Settlement Act of 1987: Hearing on S. 1684 Before the Senate Select Comm'n on Indian Affairs, 100th Cong., 1st Sess., 83-122 (1987); the text of the Compact is also a v a i l a b l e a t h t t p : / / w w w . seminoletribe.com/services/water/compact.doc (last visited October 10, 2000) [hereinafter Seminole Hearing]. See generally Jim Shore & Jerry C. Straus, The Seminole Water Rights Compact and the Seminole Indian Land Claims Settlement Act of 1987, 6 J. Land Use & Envtl L. 1 (1990); Barbara S. Monahan, Note, Florida's Seminole Indian Land Claims Agreement: Vehicle for an Innovative Water Rights Compact, *15 Am. Indian L. Rev. 341 (1991).*

n138 Seminole Indian Land Claims Settlement Act of 1987, Pub. L. No. 100-228, 101 Stat. 1556 (codified as amended in *25 U.S.C. § 1772).*

n139 Seminole Hearing, supra note 137, at 41-44.

n140 Seminole Compact at 25-27, reprinted in Seminole Hearing, supra note 137, at 111-13. The percentage of the tribal right is generally fifteen percent. In this sense, the Seminole Compact appears to apportion the water between the Tribe and the state riparian users. See supra note 135 and accompanying text (discussing the idea of viewing tribal reserved rights in riparian states as an apportionment rather than a priority).

n141 Florida practices a form of regulated riparianism, requiring a state permit for riparian uses. Water use is administered not by a central state agency, but by regional water management districts. See *Fla. Stat. Ann. §§ 373.203-249.*

n142 Seminole Hearing, supra note 137, at 41-44.